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Product Liability and the Politics of Corporate Presence: Identity and Accountability in Macpherson v. Buick

Jonathan Kahn

PRODUCT LIABILITY AND THE POLITICS OF CORPORATE PRESENCE: IDENTITY AND ACCOUNTABILITY IN *MACPHERSON V. BUICK*

*Jonathan Kahn**

I. INTRODUCTION

Pity the poor corporation![1] It has long been recognized as a "person" under American law[2] and, generally speaking, people have identities. But the corporation has been sadly overlooked in recent debates about "identity politics." Identity politics asserts, among other things, the importance of according due consideration to identity as an operative category for evaluating legal rights and duties. What then is the legal significance of corporate identity? In this paper I go back to the early twentieth century, when large-scale, complex corporations first emerged as a dominant force in American life, to consider how legal processes and institutions came to endow the corporate person with attributes that gave it a specific type of

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1. Throughout this Article, I use the term "corporation" to refer specifically to business corporations as distinct from governmental, religious, or nonprofit corporations.

2. *See, e.g.*, Santa Clara County v. S. Pac. R.R. Co., 118 U.S. 394 (1886); Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 250 (1819); SCOTT R. BOWMAN, THE MODERN CORPORATION AND AMERICAN POLITICAL THOUGHT: LAW, POWER, AND IDEOLOGY (1996); LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 166-78 (1973); MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW: THE CRISIS OF LEGAL ORTHODOXY 1870-1960, at 65-107 (1992).

identity. My focus is the law of torts which I take to have been a critical field for identifying and managing the newly emergent corporation. More specifically, I look at the emergence of product liability law during the early twentieth century. My primary text is Benjamin Cardozo's path breaking opinion in the 1916 case of *MacPherson v. Buick Motor Co.*[3] I argue that new doctrines of product liability constructed and enacted conceptions of corporate identity that situated the corporation as "present" in its defective products such that it might be held responsible for foreseeable harm they caused.

Product liability presents a flip side to the "politics of presence," in which the representation of corporate identity in its products provides the basis for imposing burdens rather than expressing interests. Thus, in approaching corporate identity, this Article does not look at such attributes as race, gender, or even nationality, although these are significant issues and deserving of exploration. Rather, it examines how the determination of corporate responsibility and liability under particular rules of tort implicitly located, shaped, and bounded the corporate entity. This, in turn, has powerful implications for how we view the nature and legitimacy of corporate power in modern society.

By defining the duties of the corporation to society, product liability law implicated issues of agency, will, and responsibility that are critical to elaborating a substantive conception of corporate identity. These conceptions have played a critical role in the development of the standing and legitimacy of corporate power in American society. Product liability law is of particular interest because it involves actors, everyday people, external to corporations and independent of the state who seek to invoke the power of the law to mediate and constrain corporate power. In the early decades of the twentieth century, we thus see tort law emerging as a decentralized, variable, and yet powerful and accessible means to contest and manage growing corporate power. Consumer empowerment, however, did not come without a cost. Product liability also helped to legitimize the proliferation of corporate products in society. Moreover, in contrast to other methods of control, such as federal regulation, product liability law fostered an atomized conception of corporate

3. 111 N.E. 1050 (N.Y. 1916).

responsibility in which isolated individual claims became the basis for assessing the proper place of the corporation in modern society, independent of more general concerns for the common good.

The emergence of the modern large-scale corporate enterprise is one of the major social, economic, and political developments of the past century. These leviathans now so dominate the landscape that their existence seems almost natural, certainly logical, and therefore inevitable. Of course, this is not the case. Yet the powerful and pervasive presence of corporations in American life does tend to foster a certain complacency as to their underlying nature. In many regards, current understanding of corporations is derived from debates initiated during the Progressive Era about the proper place and status of the corporation in society. One may distinguish at least three major sites through which knowledge and action regarding corporate identity were produced during this period: the state, corporations themselves, and society at large. Since the time of the Progressive Era itself, much has been written on state regulation of corporations, from the liberalization of state incorporation laws to the development of new federal schemes of commerce and antitrust regulation.[4] More recently, a rich and innovative literature has developed analyzing the role of advertising and public relations as means through which corporations constructed identities for themselves before the public.

I argue that product liability law provided an additional important site in which actors in society at large were able to engage corporations in a manner that implicitly defined and shaped corporate identity and power in society. The state and corporations certainly were not absent from the arena of tort law. Through the courts, the state mediated, enabled, and often constrained encounters between plaintiffs and corporations. Often, corporations themselves were plaintiffs in tort actions against other corporations. Moreover, plaintiffs' attempts to engage corporations through the courts were further

4. *See generally*, BOWMAN, *supra* note 2, at 37 (writing that Congress passed the Sherman Antitrust Act in 1890 to regulate monopolies and unfair trade restraints, while numerous states relinquished regulatory control over corporations); Gregory A. Mark, *The Personification of the Business Corporation in American Law*, 54 U. CHI. L. REV. 1441, 1441-43 (1987) (noting that by the late nineteenth century, states were abandoning their attempts to regulate corporations through corporate charters).

mediated by legal professionals. This intermingling of actors, however, enriches the field of tort law as a focus of analysis.

One might also reasonably look to the law of contracts as a site for similar implicit constructions of corporate identity. I, however, choose to focus on tort law for two main reasons. First, doctrinally, tort law, especially the law of negligence, involves issues of agency, will, and responsibility more immediately than contracts. This was especially so during the early twentieth century when new understandings of the nature and scope of negligence law were undergoing critical articulations and reevaluations. Second, contracts generally involve a mutually consented-to agreement that the corporation voluntarily entered into and, so, had some power to shape. That is, contracts involve the voluntary engagement of the corporation in a particular activity with a specific party chosen by the corporation. Tort law is somewhat different. It tends to originate external to the corporation and is therefore less subject to corporate control. The plaintiff in tort cases is not predetermined by the corporation's choice as in a contract, but rather, may arise from any member of society that is adversely affected by the corporation's products or actions. Thus, as corporations came to pervade and dominate multifarious segments of society, tort law provided an important avenue to engage, respond to, and contest the terms of corporate power.

II. CORPORATE PERSONALITY AND CORPORATE IDENTITY

It is common knowledge today, at least in legal circles, that the corporation is a person at law, with certain attendant rights and duties. From Justice John Marshall's classic description in *Dartmouth College v. Woodward*, of the corporation as "an artificial being, invisible, intangible, and existing only in contemplation of law,"[5] to the conclusory assertion in *Santa Clara County v. Southern Pacific Railroad* that a corporation was a person deserving of equal protection under the Fourteenth Amendment,[6] it seems axiomatic that corporations are legal persons—or one might say they are endowed with personality by the law.

5. 17 U.S. (4 Wheat.) at 303.
6. 118 U.S. at 394.

During the early twentieth century, however, as corporations became giant national institutions commanding huge amounts of labor and capital, new attention was focused upon their peculiar nature and status before the law. The question of corporate personality was certainly discussed before the 1900s,[7] but with Frederick Maitland's translation and introduction to Otto Gierke's *Political Theories of the Middle Ages* in 1900, a lively and long-sustained transatlantic debate over the nature of corporate personality developed among legal and political theorists. Thus, as Morton Horwitz has noted:

> Beginning in the 1890s and reaching a high point around 1920, there is a virtual obsession in the legal literature with the question of corporate personality. Over and over again, legal writers attempted to find a vocabulary that would enable them to describe the corporation as a real or natural entity whose existence is prior to and separate from the state.[8]

Everybody seemed to have something to say on the subject. In addition to Maitland, an illustrative, though not exhaustive, list of some of the more articulate and influential contributors to the debate includes Thurman Arnold, Adolf Berle, Morris Cohen, John Dewey, E. Merrick Dodd, Harold Laski, Arthur Machen, Max Radin, Paul Vinogradoff, and I. Maurice Wormser.[9]

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7. *See, e.g.*, ERNST FREUND, THE LEGAL NATURE OF CORPORATIONS (1987).

8. HORWITZ, *supra* note 2, at 101.

9. *See, e.g.*, THURMAN W. ARNOLD, THE FOLKLORE OF CAPITALISM 185-206 (1937); ADOLF A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1933); I. MAURICE WORMSER, FRANKENSTEIN INCORPORATED (1931); Adolf A. Berle, Jr., *The Theory of Enterprise Entity*, 47 COLUM. L. REV. 343 (1947); Morris R. Cohen, *Communal Ghosts and Other Perils in Social Philosophy*, 16 J. PHIL. PSYCHOL. & SCI. METHODS 673 (1919); John Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L.J. 655 (1926); E. Merrick Dodd Jr., *Dogma and Practice in the Law of Associations*, 42 HARV. L. REV. 977 (1929); Harold J. Laski, *The Personality of Associations*, 29 HARV. L. REV. 404 (1916); Arthur W. Machen, Jr., *Corporate Personality*, 24 HARV. L. REV. 253, 357-65 (1911); Max Radin, *The Endless Problem of Corporate Personality*, 32 COLUM. L. REV. 643 (1932); Paul Vinogradoff, *Juridical Persons*, 24 COLUM. L. REV. 594 (1924). For an extensive review of European theoretical writings on corporate personality, see FREDERICK HALLIS, CORPORATE PERSONALITY: A STUDY IN JURISPRUDENCE (1930).

Discussions of corporate personality ranged from issues of criminal liability to diversity jurisdiction and tax law. Over time, three basic models of corporate personality emerged from the debates. First, going back at least to Marshall's opinion in *Dartmouth*, was the fiction theory which, to varying degrees, held that the corporation was a mere creature of the state whose existence depended upon the legislative privilege of granting a corporate charter.[10] Proponents of the fiction theory also looked to Friedrich Karl von Savigny, a German theorist of the mid-nineteenth century, as a major expositor of this view.[11] Second, a partnership or contractual paradigm treated corporations as private entities existing independent of the state but virtually equivalent to partnerships. Third, was the "real entity" theory, influenced by Gierke and Maitland, which argued that corporate personality was as real as the underlying business entity composed of persons coming together to do business in common.[12] Under this theory, the grant of a charter from the state merely recognized and conferred certain rights upon the preexisting real entity.[13] Given the rise of liberal general incorporation laws during the 1890s, this argument took on added force as the granting of corporate charters became almost *pro forma*.[14] A separate approach denied the

10. *See* 17 U.S. (4 Wheat.) at 303-04.

11. *See, e.g.*, ALEXANDER NÉKÁM, THE PERSONALITY CONCEPTION OF THE LEGAL ENTITY 22, 64-65 (1938); Machen, *supra* note 9, at 255. Among some theorists, the "fiction" theory is distinguished from the "concession" theory of corporate personality. The former drew on medieval doctrine to emphasize the purely incorporeal, conceptual nature of the corporation; the latter, essentially a product of the rise of the nation-state, emphasized that the corporation existed only as sanctioned by prescription of license from the state. *See, e.g.*, Dewey, *supra* note 9, at 665-69. Both, however, may be distinguished from the natural entity theory which posits an independent social and economic existence for the business entity. *See* HORWITZ, *supra* note 2, at 100-05.

12. *See, e.g.*, HORWITZ, *supra* note 2, at 100-05; NÉKÁM, *supra* note 11, at 53, 73; Machen, *supra* note 9, at 256.

13. *See* HORWITZ, *supra* note 2, at 100-05.

14. *See id.* Morton Horwitz distinguished two theories from the fictional or artificial entity approach. First, was a contractualist or partnership approach which emphasized the group nature of corporations; second, was the natural entity theory which "capitalize[d] on the language of natural rights individualism by portraying the corporation as just another right-bearing person." HORWITZ, *supra* note 2, at 104. Mark Hager adopts a similar tripartite analysis of theories of corporate personality, distinguishing a fiction theory, a contractualist-association paradigm and a real-entity theory. *See* Mark M. Hager,

utility of employing the metaphor of corporate personality altogether, asserting that debates over the real or fictional status of the corporate person obscured a clear understanding of the practical functioning of the corporation.[15]

Commenting on some of the practical implications of corporate personification, Scott Bowman argues that:

> Corporate enterprise could not have secured its extraordinary legal privileges or achieved ideological acceptance so readily [during the Progressive Era] without assuming the guise of personhood in a market economy. . . . Both the legal edifice of corporate power and its ideological justification in the law have been built on legal and moral conceptions of the corporate individual.[16]

As Alexander Nékám noted in 1938, both fiction and real-entity theories of corporate personality shared the same fundamental assumption that human personality was a natural foundation of legal predicates.[17] Anthropomorphizing the corporation, such theories contributed to the dynamic observed by Bowman whereby the concept of the corporation as an individual facilitated social acceptance of the large corporation by recasting its image from one of inefficient monopoly into an entrepreneurial person, fully in line with the individualistic premises of American liberalism.[18]

A. The State Shaping Corporate Identity

In the early nineteenth century, corporations were few and limited in their operations.[19] Legal and political management of corporations was largely informed by the concession or grant theory of the corporation as an artificial entity.[20] As manifest in the political mechanism of the special charter, grant theory in action meant that

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Bodies Politic: The Progressive History of Organizational "Real Entity" Theory, 50 U. PITT. L. REV. 575, 579-82 (1989); *see also* Mark, *supra* note 4, at 1464-78.

15. *See, e.g.*, Cohen, *supra* note 9; Dewey, *supra* note 9; Radin, *supra* note 9.

16. BOWMAN, *supra* note 2, at 3.

17. *See* NÉKÁM, *supra* note 11, at 53.

18. *See* BOWMAN, *supra* note 2, at 8-9.

19. *See* FRIEDMAN, *supra* note 2, at 166.

20. *See id.*; HORWITZ, *supra* note 2, at 72.

corporations could only come into being as legally sanctioned entities subject to special legislative acts specific to the particular enterprise.[21] Special charters dictated stringent requirements concerning such things as a defined corporate purpose, duration of existence, voting rights of stockholders, and levels of capitalization.[22] In part, responding to Jacksonian claims that special charters encouraged undemocratic monopolies, legislatures began to make the corporate form more freely available in the 1830s.[23] By the mid-nineteenth century, a trend began toward the liberalization of incorporation law resulting in reduced state control over the internal management of corporate affairs and broader access to corporate charters.[24] Then, by the last decade of the nineteenth century, a virtual revolution in state regulation of corporations occurred.[25] Led by New Jersey and Delaware, states began to revise incorporation laws so as to "eliminate[] restrictions on a variety of essential matters, including capitalization and assets, mergers and consolidations, the issuance of voting stock, the purpose(s) of incorporation, and the duration and locale of business."[26]

As American industrial enterprise took off in the aftermath of the Civil War, new forms of corporate organization and legal regulation developed to manage and, in some cases, facilitate the emergence of large-scale corporate entities.[27] Led by the railroads, great national combines formed during the 1880s and 1890s.[28] New forms of management and organization structured the large corporations

21. *See* BOWMAN, *supra* note 2, at 51-53; FRIEDMAN, *supra* note 2, at 166; HORWITZ, *supra* note 2, at 72.

22. *See* BOWMAN, *supra* note 2, at 51; FRIEDMAN, *supra* note 2, at 167-68; HORWITZ, *supra* note 2, at 72.

23. *See* BOWMAN, *supra* note 2, at 51; FRIEDMAN, *supra* note 2, at 168-69; HORWITZ, *supra* note 2, at 73.

24. *See* BOWMAN, *supra* note 2, at 42-52; FRIEDMAN, *supra* note 2, at 166-69; HORWITZ, *supra* note 2, at 73.

25. *See* BOWMAN, *supra* note 2, at 60.

26. *Id.*

27. *See* CREATING MODERN CAPITALISM: HOW ENTREPRENEURS, COMPANIES, AND COUNTRIES TRIUMPHED IN THREE INDUSTRIAL REVOLUTIONS 315-24 (Thomas K. McCraw ed., 1997) [hereinafter CREATING MODERN CAPITALISM].

28. *See* LOUIS GALAMBOS & JOSEPH PRATT, THE RISE OF THE CORPORATE COMMONWEALTH: U.S. BUSINESS AND PUBLIC POLICY IN THE TWENTIETH CENTURY 34 (1988).

internally so as to improve the efficiency of production, transportation, and distribution of goods.[29] New methods of financing extended capital markets to draw on the resources of diverse shareholders and concentrate large amounts of capital under the control of a single firm.[30]

The increasing independence and autonomy of corporations confirmed and enabled the ascendance of the natural entity theory as the basic legal paradigm for conceptualizing the personality of the corporation.[31] It also facilitated the separation of ownership from control of the major corporate enterprises of the day.[32] As capital markets expanded, corporate shareholders grew in number and became more diffuse.[33] At the same time, fueled by greater concentrations of capital from new shareholders, corporations developed new and complex structures of management and organization to oversee their burgeoning operations and infrastructure.[34] As most influentially, though not originally, articulated by Berle and Means, this led to a separation of ownership by the shareholders from control by professional managers.[35] This new corporate entity as regulated by the

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29. *See* ALFRED D. CHANDLER, JR., THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS 456, 464-68 (1977); CREATING MODERN CAPITALISM, *supra* note 27, at 336-39.

30. *See, e.g.*, BERLE & MEANS, *supra* note 9, at 1-46; CHANDLER, *supra* note 29, at 455 *passim*; CREATING MODERN CAPITALISM, *supra* note 27, at 303-48; GALAMBOS & PRATT, *supra* note 28, at 28-36; EDWARD C. KIRKLAND, INDUSTRY COMES OF AGE: BUSINESS, LABOR AND PUBLIC POLICY 1860-1897 43-74, 163-80, 216-36 (1961).

31. *See* HORWITZ, *supra* note 2, at 100-05.

32. *See* BERLE & MEANS, *supra* note 9, at 69.

33. *See id.* at 47.

34. *See* CHANDLER, *supra* note 29, at 455-56.

35. *See* BERLE & MEANS, *supra* note 9, at 1-6, 127-41. For interesting earlier examinations of this phenomenon, see WALTER LIPPMANN, DRIFT AND MASTERY: AN ATTEMPT TO DIAGNOSE THE CURRENT UNREST 35-44 (1914); THORSTEIN VEBLEN, THE THEORY OF BUSINESS ENTERPRISE (1921). Gregory Alexander posits three factors to explain the influence of Berle and Means: First, they backed up their observations with statistical data; second, timing—the book's publication at the height of the Depression in 1933 found the public receptive to a critical treatment of corporate power; and third, its functional and institutionalist approach to the study of corporations that, in effect, finessed previous questions of corporate personality that had raged during the previous three decades. *See* GREGORY S. ALEXANDER, COMMODITY & PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL

state, was not only "real," it was also reconfigured. Shareholders stood outside of, and therefore did not in any significant way constitute the identity of, giant corporate enterprises.[36] In part, this had been a basic purpose of the business corporation since its rise in the early nineteenth century. Such separation of identity provided the conceptual basis for limited liability.[37] Shareholders could only be reached by "piercing the veil" of corporate identity.[38] But increasingly, as the liberalization of incorporation law in the 1890s enabled a massive wave of corporate mergers between 1898 and 1904, veil piercing would come to involve attempts to reach a parent corporation through a subsidiary.[39] Indeed, such laws not only facilitated the rapid emergence of giant corporations, they also resulted in the proliferation of new corporate "family trees," where the business equivalent of complex "kinship networks" would develop and provide the basis for an increasingly elaborate legal doctrine where claimants sought to pierce the veil of one corporation's identity to reach a related parent, subsidiary, or "sibling" corporation.

Perhaps the most fiercely debated issue arising out of corporate concentration involved antitrust regulation and related concerns over the moral status of big, as opposed to small, business. Between 1890 and 1914, the "trust" question pervaded American political culture as the first large-scale, integrated corporate enterprises emerged on a national level.[40] Martin Sklar characterizes this as a period of "corporate reconstruction of American capitalism" that involved:

> [A] pandemic conflict engendered by the larger conflict between two major forms of capitalist property and their corresponding modes of consciousness, or bewteen [sic] two historical stages of capitalist society: the proprietary-competitive market stage and the corporate-administered

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THOUGHT, 1776-1970, at 345-46 (1997).

36. *See* I. Maurice Wormser, *Piercing the Veil of Corporate Entity*, 12 COLUM. L. REV. 496 (1912).

37. *See* MARTIN J. SKLAR, THE CORPORATE RECONSTRUCTION OF AMERICAN CAPITALISM, 1890-1916: THE MARKET, THE LAW, AND POLITICS 50 (1988).

38. This phrase was first used by I. Maurice Wormser in his article *Piercing the Veil of Corporate Entity*. *See* Wormser, *supra* note 36 *passim*.

39. *See* SKLAR, *supra* note 37, at 51-52.

40. *See id.* at 98-99.

> market stage, the one receding before but leaving its indelible marks upon the ascendancy of the other. . . .[41]

Each form of "capitalist property" implicated different principles and schemes of corporate law, and as each vied for preeminence, corporate law experienced a period of rapid development and instability.[42] Indeed, Sklar sees the law as a major terrain of contest between the two orders.[43]

In particular, Sklar notes a tendency in the courts to favor the older, proprietary-competitive model associated with a more small-producer or populist outlook on the corporation, while the public law actions of the elected branches of the federal government favored an emergent large-producer, corporate-capitalist outlook.[44] Before 1911, the courts rigorously enforced prohibitions on restraint of trade that "obstructed and inhibited the development of the administered market regime envisioned by partisans of the corporate reorganization."[45] On the other hand, the Bureau of Corporations, created under Theodore Roosevelt's administration in 1903, consistently campaigned for a more liberal construction of antitrust laws forbidding only "unreasonable" restraints of trade.[46]

The period of conflict and uncertainty was ultimately resolved between 1911 and 1914, first by the Supreme Court's famous "Rule of Reason" decisions in *Standard Oil Co. v. United States*[47] and *United States v. American Tobacco Co.*[48] that reinstated the old common law rule that only unreasonable restraints of trade were prohibited by antitrust law; and second, by the adoption of the Clayton Act and the creation of the Federal Trade Commission ("FTC") in 1914.[49] In Sklar's view, these actions largely resolved the trust question in favor of a "policy of allocating to private parties the primary role, the initiative, in regulating the market, and to government, through executive oversight and judicial process, a secondary,

41. *Id.* at 20.
42. *See id.* at 47-53.
43. *See id.* at 89.
44. *See id.* at 91-93.
45. *Id.* at 92.
46. *See id.* at 184-90.
47. 221 U.S. 1 (1911).
48. 221 U.S. 106 (1911).
49. *See* SKLAR, *supra* note 37, at 48-49, 89-90, 146-73, 182-83.

reactive role."[50] This ultimately resulted in a "nonstatist accommodation of the law to the corporate reorganization of capitalism."[51]

Of particular interest in understanding evolving conceptions of corporate identity is the notion that the legal and political resolution of the trust question allocated regulatory initiative to private parties. Such a grant reflects the preeminence of a natural entity conception of the corporation. Morton Horwitz argues that the triumph of the real or natural entity theory in Progressive Era legal thought served "to legitimate large-scale enterprise and to destroy any special basis for state regulation of the corporation that derived from its creation by the state."[52] In important and powerful ways, the development of explicit theories of corporate personality thus facilitated and legitimized the emergence of the modern business corporation. As Horwitz indicates, however, legal doctrines of corporate personality focused primarily on the relation between the corporation and the state.[53] Its impact was therefore limited primarily to the important but hardly all-encompassing sphere of state regulation of the corporation.

Nonetheless, paraphrasing Sklar, one might also argue that the resolution of the trust issue also located the primary responsibility and impetus for continuing to shape corporate identity in the private arena with the state playing only a "secondary, reactive role."[54] Most immediately, this dynamic became manifest in the blossoming of corporate advertising and public relations on a national scale, regulated only by the FTC and related common law and statutory restrictions of fraud and misrepresentation.[55] In this arena, the corporation became the preeminent expositor of a new vision of corporate identity.[56] But the "private parties" Sklar alludes to might also be understood to encompass members of society at large.[57] Thus, in the hands of private parties, both corporations and citizens, tort law

50. *Id.* at 169.
51. *Id.* at 173.
52. HORWITZ, *supra* note 2, at 104.
53. *See id.* at 100-05.
54. *See* SKLAR, *supra* note 37, at 169.
55. *See id.* at 166-71.
56. *See* STEWART EWEN, CAPTAINS OF CONSCIOUSNESS: ADVERTISING AND THE SOCIAL ROOTS OF CONSUMER CULTURE 81-82 (1976).
57. *See id.* at 168-69.

emerged as an additional site for articulating and contesting conceptions of corporate identity. Here, too, through the courts, the state was relegated to a secondary, reactive—though significantly enabling–role.

B. The Corporation Shaping Its Own Identity

As the burgeoning literature on the development of modern advertising and public relations attests, corporations themselves had a major hand in shaping their identity as presented to the consuming public.[58] Roland Marchand directly examined this phenomenon in his richly detailed historical study, *Creating the Corporate Soul: The Rise of Public Relations and Corporate Imagery in American Big Business*.[59] Marchand, in fact, opens his book with a brief discussion of the infamous 1886 Supreme Court case of *Santa Clara County v. Southern Pacific Railroad Co.*, in which the Court "bestowed upon the business corporation, under the Fourteenth Amendment to the Constitution, the legal status of 'person.'"[60] Marchand goes on to chronicle growing concern within the corporation that society at large was coming to view the large combines of the early twentieth century as "soulless" behemoths that dominated the economic landscape without a conscience or concern for the consuming public.[61] To counter the resultant alienation and dissatisfaction—and consequent erosion of the corporation's social legitimacy—corporations developed ever more sophisticated techniques of advertising and public relations to imbue their businesses with "soul"—

58. *See, e.g.*, EWEN, *supra* note 56; STUART EWEN, P.R.!: A SOCIAL HISTORY OF SPIN (1996); WILLIAM LEACH, LAND OF DESIRE: MERCHANTS, POWER, AND THE RISE OF A NEW AMERICAN CULTURE (1993); JACKSON LEARS, FABLES OF ABUNDANCE: A CULTURAL HISTORY OF ADVERTISING IN AMERICA (1994); ROLAND MARCHAND, ADVERTISING THE AMERICAN DREAM: MAKING WAY FOR MODERNITY, 1920-1940 (1986); JAMES D. NORRIS, ADVERTISING AND THE TRANSFORMATION OF AMERICAN SOCIETY, 1865-1920 (1990).

59. ROLAND MARCHAND, CREATING THE CORPORATE SOUL: THE RISE OF PUBLIC RELATIONS AND CORPORATE IMAGERY IN AMERICAN BIG BUSINESS (1998).

60. *Id.* at 7.

61. *See id.* at 7-8.

that is, with a distinctive identity that consumers would find familiar and attractive.[62]

Through case studies of such emerging corporate giants as AT&T and General Motors, Marchand explores how businesses showcased everything, from the skyscrapers that housed their corporate headquarters to the biographies of their founders, to evoke associations of stability, uplift, and human ingenuity.[63] Thus, for example, in the case of AT&T, Marchand shows how Theodore Vail, upon becoming president of the powerful monopoly in 1908, embarked on "the first, most persistent, and most celebrated of the large-scale institutional advertising campaigns of the early twentieth century. Its primary purpose was political—to protect a corporation with an odious public reputation against threats of public ownership or hostile regulation."[64] AT&T succeeded spectacularly through such tactics as promoting employees who came in frequent contact with the public, such as line workers and operators, that put a human face on the corporation.[65]

C. Society Shaping Corporate Identity

Corporate public relations images of business did not go uncontested. From the targeted muckraking of Ida Tarbell and Upton Sinclair, to the more general critiques of corporate culture found in such writers as Sinclair Lewis, counter-narratives of the soulless or "bad" corporation continued to abound.[66] What muckrakers and corporations had in common was their audience. Each sought to construct images of corporate identity in the minds of the public. They presented images, slogans, facts, and stories to substantiate and make comprehensible the otherwise distant, complex, and amorphous business entities that were coming to dominate social, economic, and political life in America. The battle to construct corporate identity, therefore, ironically involved little direct engagement with the

62. *See id.* at 10.
63. *See id.* at 10, 36, 130.
64. *Id.* at 48.
65. *See id.* at 63-69.
66. *See* SINCLAIR LEWIS, BABBIT (1998); UPTON SINCLAIR, THE JUNGLE (1985); IDA M. TARBELL, THE HISTORY OF THE STANDARD OIL COMPANY (David M. Chalmers ed., 1966).

corporation itself. It took place in the arena of public opinion, outside of the boundaries of the corporations themselves. Corporations were constructing and projecting identities outward to the public. Muckrakers and other critics similarly asserted alternative visions of the corporation for public consumption. Neither process involved actors external to the corporation seeking to engage the corporation directly in a manner that constructed or imposed identity upon it. The remainder of this Article will be devoted to exploring the peculiar dynamic of how product liability law became a site for such direct engagement, with powerful implications for the implicit elaboration of corporate identity in the era of the triumph of corporate capitalism.

III. TORT LAW AND CORPORATE IDENTITY

In his 1924 article, *Juridical Persons*, Paul Vinogradoff, in discussing theories of corporate personality, asserted that:

> A touchstone of the two theories [a fiction or real entity] is presented by the application to corporations of the law of torts. As long as we deal with property or contract we can use both theories indifferently, but when we come to torts we are embarrassed by the necessity of admitting certain ethical and psychological features which cannot be dealt with on the basis of the theory of fiction.[67]

The issue for Vinogradoff was how torts involved attributing responsibility to corporate actors just as we do to natural persons. The area of tort law with the greatest practical implications for corporate responsibility and corporate power was negligence.[68] Before the Civil War, torts was not even considered a distinct branch of the law.[69] The rise of the modern negligence doctrine bears an important relation to the increasing complexity of social and industrial life and the rise of industrial accidents during the last third of the nineteenth century.[70] In 1881, Oliver Wendell Holmes Jr., in his influential book,

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67. Vinogradoff, *supra* note 9, at 602.

68. *See* G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 16 (1980).

69. *See id.* at 4-14.

70. *See id.* at 15-19; *see also* Lawrence M. Friedman & Jack Ladinsky, *Social Change and the Law of Industrial Accidents*, 67 COLUM. L. REV. 50

The Common Law, took the significant step of isolating negligence as a comprehensive principle in tort law.[71] G. Edward White argues that Holmes' contribution was important in two respects:

> First, it systematized an embryonic expansion in American case law of the meaning of negligence from that of neglect of a specific, predetermined duty to that of a violation of a more general duty potentially owed to all the world. Second, Holmes's isolation of "modern negligence" was to provide Torts with a philosophical principle: no liability for tortious conduct absent fault, with fault to be determined by reference to "motives of policy" or "the felt necessities of the times." Within a short space of time, that principle came to dominate tort law.[72]

By the early twentieth century, tort law remained essentially a common law subject dominated by negligence principles that had become increasingly systematized over the years.[73] It was affected by social and industrial developments, but in practice the development of negligence, in particular, "emphasized limitations on liability as much as it widened the potential scope of civil duties."[74]

A central component of ongoing efforts to systematize tort law was the *Restatement of Torts*, compiled during the 1920s and first published in 1934.[75] The *Restatement* defined the word "act" as "an external manifestation of the actor's will."[76] In a further comment it stated that "there cannot be an act without volition."[77] When applied to corporations, the law of torts implicates an understanding of the corporate person as having will and volition. As courts increasingly were called upon to evaluate claims against rapidly proliferating corporations, they necessarily had to try to locate corporate will and

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(1967) (discussing the evolution of the law of industrial accidents and workmen's compensation).

71. *See* OLIVER WENDELL HOLMES JR., THE COMMON LAW 63-129 (Mark DeWolf Howe ed., 1963).

72. WHITE, *supra* note 68, at 13.

73. *See id.* at 57, 61.

74. *Id.* at 61.

75. *See* RESTATEMENT OF TORTS (1934).

76. *Id.* at § 2.

77. *Id.* at § 2 cmt. a.

volition in specific contexts.[78] In so doing, they effectively limned the contours of identity for the corporate person.[79]

As the *Restatement* itself indicates, Benjamin Cardozo, a member of the Council of the American Law Institute, "attended a very considerable number of the conferences relating to the subject-matter" of the *Restatement of Torts*.[80] In his exhaustive biography of Cardozo, Andrew Kaufman shows how Cardozo influenced, and in turn had his judicial opinions influenced by, the work of the Council on the *Restatement*.[81]

Cardozo was one of the major tort theorists of his day and perhaps the most influential judge in the field. Cardozo's opinions exhibit an acute awareness of Holmes' concern to meet "the felt necessities of the time."[82] He took an empirical and pragmatic approach to judging.[83] He generally tried to put claims in their historical and social context.[84] Richard Posner characterizes Cardozo's "rejection of essentialism" as "facilitative . . . . [A]s a service to lay communities in the achievement of those communities' self-chosen ends rather than as a norm imposed on those communities in the service of a higher end."[85] In his posthumous tribute to Cardozo, Warren Seavey saw torts as the field closest to Cardozo's heart.[86] Seavey asserted that:

> It is not chance that he (Cardozo) was at his best in this field which touches most closely the everyday life of the community. Impatient of purely legalistic reasoning, interested primarily in people rather than in the intricacies of business, he found in torts perhaps the best field for the expression of his philosophy of life.[87]

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78. *See* Vinogradoff, *supra* note 9, at 595, 603.
79. *See id.* at 604.
80. RESTATEMENT OF TORTS xii-iii (1934).
81. *See* ANDREW L. KAUFMAN, CARDOZO 174-75, 287-95 (1998).
82. HOLMES, *supra* note 71, at 5.
83. *See* KAUFMAN, *supra* note 81, at 134.
84. *See id.* at 134-35.
85. RICHARD A. POSNER, CARDOZO: A STUDY IN REPUTATION 93-94 (1990).
86. *See* Warren A. Seavey, *Mr. Justice Cardozo and the Law of Torts*, 52 HARV. L. REV. 372, 373 (1939).
87. *Id.* at 373-74. Referring to Seavey's work, Walter Probert notes that "Cardozo's ultimate appeal seems more to have been to a moral dimension of

Ironically, Cardozo's very concern for the "everyday life of the community" led him to write tort opinions that had profound implications for the "intricacies of business" that, to Seavey at least, seemed of less interest to him.[88] Cardozo was indeed "interested primarily in people," and so in dealing with business in negligence cases, his opinions were informed by an ethical sensibility that imparted duty, agency, and will to the corporation in a manner that "fleshed out" the identity of the corporate person.[89] Of his many writings and opinions of torts, *MacPherson v. Buick Motor Co.*[90] had profound implications as a basis for engaging and managing corporate power.

IV. IDENTIFYING THE CORPORATION: *MACPHERSON V. BUICK*

A. Background

Stephen Skowronek refers to the period from 1877 to 1900 as a triumph for what he terms "the state of courts and parties."[91] In the field of business regulation in particular, Skowronek argues that the courts played a preeminent role in structuring relations between the state and emerging national corporations.[92] Only after 1900 did this "patchwork" approach give way to a more systematic "reconstruction" of state administrative power that "replac[ed] courts and parties with national bureaucracy."[93] This is reasonably accurate and insightful insofar as one focuses on efforts directed self-consciously toward using the state to develop comprehensive statutory schemes to regulate business. Tort law, however, also functioned during this period as a means to engage and manage corporate action in society. For example, in their classic article, *Social Change and the Law of*

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tort law, to a principle, or even an ideal that had a continuing influence over the years." Walter Probert, *Applied Jurisprudence: A Case Study of Interpretive Reasoning in* MacPherson v. Buick *and Its Precedents*, 21 U.C. DAVIS L. REV. 789, 797 (1988).

88. *See* Seavey, *supra* note 86, at 373-74.

89. *See id.* at 374-93.

90. 111 N.E. 1050 (N.Y. 1916).

91. STEPHEN SKOWRONEK, BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877-1920, at 39 (1982).

92. *See id.* at 19-46, 121-62.

93. *Id.* at 287.

Industrial Accidents, Lawrence Friedman and Jack Ladinsky explore how tort law developed in the second half of the nineteenth century in direct relation to rapid industrial growth.[94] In particular, they show how tort law could be a powerful instrument in the hands of industrial workers who demanded compensation for injuries suffered at the hands of fellow workers; so much so, that courts extended the "fellow-servant" rule to shield corporations from extensive liability claims that might impede more rapid industrial development.[95] As exceptions to the rule proliferated, pressure grew to impose some sort of legislative resolution to such challenges from workers.[96] Thus, between 1910 and 1920, workmen's compensation statutes proliferated across the United States, effectively removing industrial accidents from the realm of tort law.[97]

As legislatures were appropriating the law of industrial accidents to regulated statutory schemes, the courts were extending tort law to incorporate a new type of accident resulting from the next stage of industrialization—product liability. Here, the injured party was not a worker in a factory but the consumer, remote from the corporation, who bought a defective product through a middleman within a web of extended market relations that might range across the entire nation.

During the nineteenth century, the rule of privity of contract governed most relations between buyers and sellers of products in the market. Briefly stated, privity meant that a seller was liable for defects in the product sold only to the immediate purchaser with whom he had contracted.[98] The leading authority on privity was *Winterbottom v. Wright*,[99] an English case from 1842 in which the driver of a stagecoach suffered an injury when the coach broke down and turned over.[100] The driver brought suit not against his employer, but against the contractor who had agreed with the employer to

94. *See* Friedman & Ladinsky, *supra* note 70, at 52.
95. *See id.* at 58.
96. *See id.* at 70.
97. *See id.*
98. *See* Winterbottom v. Wright, 152 Eng. Rep. 402 (Exch. 1842); *see also* John C.P. Goldberg & Benjamin C. Zipursky, *The Moral of* MacPherson, 146 U. PA. L. REV. 1733, 1750-52 (1998).
99. 152 Eng. Rep. 402 (Exch. 1842).
100. *See id.* at 403.

supply and keep the coach in good repair.[101] The court denied any recovery on the ground that there was no "privity of contract" between the parties and hence, the contractor owed no duty of care to the driver.[102] In subsequent cases, exceptions to the rule were gradually carved out, allowing recovery in the absence of privity in certain special situations.[103] The foundational case in this regard was *Thomas v. Winchester,*[104] an 1852 decision in which a customer who purchased a mislabeled bottle of poison from a druggist recovered damages from the original seller who supplied the bottle to the druggist. The rationale was that inherently dangerous products such as poisons demanded greater care in handling and foresight as to future uses on the part of producers and sellers.[105]

Under these limited conditions, liability for defectively manufactured products remained largely confined to the arena of contract law during the nineteenth century. A person harmed by a product generally had legal recourse only against the person from whom she had purchased the item. In a localized economy, dominated by face-to-face market transactions, this often meant that the purchaser had recourse against the actual producer. Moreover, as William Landes and Richard Posner have observed, most consumer products of this era were "simple" in the sense that the consumer could determine their quality relatively easily through simple inspection.[106] Landes

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101. *See id.*

102. *See id.* at 405. For an analysis of *Winterbottom* as a classic "no duty" case, see Goldberg & Zipursky, *supra* note 98, at 1750-52.

103. *See, e.g.*, Thomas v. Winchester 6 N.Y. 397 (1852).

104. *Id.*

105. *See id.* at 409-11.

106. *See* WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 284-85 (1987). Landes and Posner give the example of a cantaloupe, "whose ripeness can be determined by squeezing," as one such "simple" product. Ironically, William Prosser earlier observed that "[t]he extension of . . . strict liability to third persons with whom the seller had made no contract came after the turn of the century . . . [in] the aftermath of a prolonged and violent national agitation over defective food . . . ." William L. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L. J. 1099, 1104 (1960). Of course, this shift reflects the industrialization of food production by such corporate giants as Armour and other meat packers whose practices notoriously formed the model for Upton Sinclair's muckraking novel, *The Jungle*. This shows how food, a once seemingly simple and accessible product can be rendered distant, complex, and obscure

and Posner contrast such "simple" goods with "experience" and "credence" goods, which came to dominate consumer markets in the twentieth century.[107] "'Experience' goods require use rather than merely touching or inspection to reveal their qualities."[108] Credence goods "may not reveal their true attributes even after substantial use."[109] Landes and Posner offer automobiles as an example of a typical credence good.[110] Automobiles are an especially apt example because they are classic emblems of modern urban industrial America. By the early twentieth century, automobiles were being produced by large corporations and distributed nationally through networks of intermediary dealers who were often distant from the point of production.[111] Indeed, the automobile also grew to become perhaps the archetypical representation of modern consumer society. It is fitting, therefore, that the automobile also provided the site for Benjamin Cardozo's famous "assault on the citadel of privity"[112] in the 1916 case of *MacPherson v. Buick Motor Co.*,[113] the foundation of the modern doctrine of products liability.

The case involved the collapse of a Buick Model 10 automobile due to a defective wheel.[114] Donald MacPherson had purchased the car from Close Brothers, a retail dealership, but he chose to sue Buick for negligence.[115] In his opinion, Cardozo stated the basic issue as "whether the defendant owed a duty of care and vigilance to any one [sic] but the immediate purchaser."[116] Close Brothers was the immediate purchaser and hence "in privity" with Buick.[117] MacPherson was a subsequent purchaser not in privity with Buick.[118] There was no doubt that MacPherson could sue Close Brothers, but allowing MacPherson to trace liability back to Buick would have

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through processes of industrialization in a national market economy.

107. *See* LANDES & POSNER, *supra* note 106, at 284-85.
108. *Id.* at 284.
109. *Id.* at 285.
110. *See id.* at 284-85.
111. *See id.* at 285.
112. Ultramares Corp. v. Touche, 174 N.E. 441 (1931).
113. 111 N.E. 1050 (N.Y. 1916).
114. *See id.* at 1051.
115. *See id.*
116. *Id.*
117. *See id.*
118. *See id.*

powerful and far reaching consequences—especially in an increasingly national market economy dominated by extended transactions where more and more goods flowed across many miles and through many hands before reaching their ultimate users.

Reviewing a variety of previous cases, Cardozo distinguished *Winterbottom* with the terse assertion that "[p]recedents drawn from the days of travel by stagecoach do not fit the conditions of travel today."[119] Instead, he chose to expand upon the exceptions laid down by cases such as *Thomas* as a basis for upholding the imposition of liability upon Buick, even in the absence of privity.[120] Richard Posner notes that Cardozo's tone throughout the opinion was "qualified . . . modest . . . [and] reticent."[121] Such rhetorical tact characterized many of Cardozo's opinions and is generally construed as a key element of their influence. Cardozo had a way of making radical innovation appear logical, reasonable, even pedestrian.

Perhaps this tension between tone and import accounts for some divergence among subsequent evaluations of the significance of Cardozo's opinion. Posner, for example, calls *MacPherson* "Cardozo's most important opinion in terms of impact on the law" and attributes "its rapid adoption by other states" to its quiet tone.[122] The opinion owes its impact, in part, to its effective incorporation into the *Restatement of Torts*, then being compiled—with Cardozo's active participation—by the American Law Institute.[123] While Posner's view is shared by many, others have argued that liability beyond privity of contract "was [a] familiar doctrine to the New York Court of Appeals before [*MacPherson*],"[124] and observed that at least through the 1930s, the doctrine of *Winterbottom* continued to hold sway in most jurisdictions.[125] Cardozo himself noted in 1924 that the "current"

119. *Id.* at 1053.
120. *See id.*
121. POSNER, *supra* note 85, at 109.
122. *Id.*
123. *See* RESTATEMENT OF TORTS §§ 395-96 (1934).
124. Robert Martin Davis, *A Re-Examination of the Doctrine of* MacPherson v. Buick *and Its Application and Extension in the State of New York*, 24 FORDHAM L. REV. 204, 204 (1955).
125. *See* Lester W. Feezer, *Tort Liability of Manufacturers and Vendors*, 10 MINN. L. REV. 1, 3-6 (1925); Lindsey R. Jeanblanc, *Manufacturers' Liability to Persons Other than Their Immediate Vendees*, 24 VA. L. REV. 134, 135 (1938). In a more recent article on the origins of enterprise liability, George

established by *MacPherson* was "not uniform," noting that "[r]ecent decisions in Massachusetts have enforced the requirement of privity."[126] Even Warren Seavey in his effusive assessment of Cardozo's contribution to tort law published in 1939, conceded that "[i]t would not be true to state that the case has been universally followed."[127] Seavey concluded, however, that "there is little doubt of the ultimate complete acceptance of Cardozo's viewpoint."[128] Time proved Seavey prescient. By 1960, William Prosser could assert that "[d]uring the suceeding [sic] years this decision [*MacPherson*] swept the country, and with the barely possible but highly unlikely exceptions of Mississippi and Virginia, no American jurisdiction now refuses to accept it."[129]

B. The Case

In 1910, Donald MacPherson, a stone cutter from Galway Village, a small town in upstate New York, traveled about seventeen miles to the city of Schenectady where he purchased a Buick Model 10 runabout from Close Brothers, a local automobile dealership.[130] The car, one of Buick's best selling modestly priced models, had a front seat for two and a rumble seat for one on the box behind.[131] The car was rated to go fifty miles per hour.[132] MacPherson used the car during the summer and fall of 1910 without incident. He next used it in May 1911, and intermittently thereafter until July 25, 1911. On that day, MacPherson agreed to take a sick neighbor and his brother to the hospital in Saratoga Springs.[133] Just outside of

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Priest argues that "the subject of manufacturer or retailer liability for defective products was of minor scholarly significance during the 1930s and 1940s." George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461, 482 (1985).

126. BENJAMIN N. CARDOZO, LL.D., THE GROWTH OF THE LAW 78 (1924).

127. Seavey, *supra* note 86, at 379.

128. *Id.*

129. LANDES & POSNER, *supra* note 106, at 1100.

130. The basic factual details are drawn from the lower court opinion, MacPherson v. Buick Motor Co., 138 N.Y.S. 224, 224-25 (N.Y. App. Div. 1912). Additional details may be found in DAVID W. PECK, DECISION AT LAW 38-69 (1961).

131. *See MacPherson*, 138 N.Y.S. at 225.

132. *See id.*

133. *See id.* at 225-26.

Saratoga Springs the car suddenly collapsed.[134] MacPherson was thrown out of the car and injured. It was later determined at trial that the collapse was caused by a defective rear wheel, made of poor quality hickory wood that had splintered into fragments.[135]

MacPherson hired Edgar Brackett to sue Buick for the harm caused by the defective automobile.[136] Brackett was a very prominent and powerful local lawyer who was also the state senator from the district.[137] For its part, Buick thought the case important enough to send a lawyer from Detroit to try the case.[138] The company also expended considerable amounts of money and effort to bring in representatives from auto and wheel makers from all over the country to testify as experts.[139] The jury brought in a verdict for MacPherson in the amount of $5,025.[140] The Appellate Division affirmed the judgement in 1914,[141] and the case reached the Court of Appeals in 1916.[142]

By 1909, Buick was becoming a major player in the emerging automobile industry under the dynamic, if sometimes erratic, leadership of William Durant.[143] Like many leaders in the new business of motor car production, Durant first worked at making carriages.[144] After a couple of abortive attempts to manufacture motor cars, Durant took over the small Buick Motor Company in 1904.[145] Durant's genius for business lay less in solving the technical problems of automobile manufacturing than in organizing production and

134. *See id.* at 226.
135. *See id.*
136. *See* PECK, *supra* note 130, at 43.
137. *See id.*
138. *See id.* at 46.
139. *See* KAUFMAN, *supra* note 81, at 270; PECK, *supra* note 130, at 46-49.
140. *See* KAUFMAN, *supra* note 81, at 270.
141. *See* MacPherson v. Buick Motor Co., 145 N.Y.S. 462 (N.Y. App. Div. 1914).
142. *See* MacPherson v. Buick Motor Co., 111 N.E. 1050 (N.Y. 1916).
143. *See* ALFRED D. CHANDLER, JR., STRATEGY AND STRUCTURE: CHAPTERS IN THE HISTORY OF THE INDUSTRIAL ENTERPRISE 114-18 (1962); ARTHUR POUND, THE TURNING WHEEL: THE STORY OF GENERAL MOTORS THROUGH TWENTY-FIVE YEARS, 1908-1933, at 80-90 (1934); BERNARD A. WEISENBERGER, THE DREAM MAKER: WILLIAM C. DURANT, FOUNDER OF GENERAL MOTORS 83-116 (1979).
144. *See* CHANDLER, *supra* note 143, at 116.
145. *See id.* at 116-17; POUND, *supra* note 143, at 77-80.

distribution.[146] He centralized production of the diverse components of the automobile near the main Buick factory in Flint, Michigan.[147] Durant integrated into his organization businesses developed during the previous decade with Dallas Dort.[148] The Durant-Dort family of companies included the old Durant-Dort carriage works, the Flint Varnish Works, the Flint Axle Works, and the Imperial Wheel Company.[149] Durant also convinced Charles Stuart Mott to move his axle-making company to Flint to insure a steady supply of these important components.[150] As he was centralizing access to supplies, Durant also worked hard to develop a national distributing and dealership organization.[151]

Under Durant's guidance, Buick grew rapidly. As Alfred Chandler has noted, "Durant's energy and creative ability were reflected in Buick's output. In 1903, the company produced 16 cars and in 1904, 31; but in 1906 it made 2,295 and in 1908, 8,487. In four years, Buick became the leading automobile producer in the United States."[152] In 1908, Durant instigated the formation of the General Motors Corporation, which soon took over Buick.[153] Buick continued to grow, and leading the way was its popular Model 10 that started the company on the heaviest production it had yet known.[154] In 1909, the company produced 14,606 cars—half of them Model 10s which sold for $900 each.[155] By this time, Buick had "a reputation with the public which made it a tower of strength."[156] The following year, Buick would sell approximately ten thousand 1910 Model 10 runabouts, about one-third of its total production.[157] Buick did not manufacture its cars from the ground up. Rather, for many

146. *See* CHANDLER, *supra* note 143, at 118.
147. *See id.* at 117.
148. *See id.*
149. *See* POUND, *supra* note 143, at 82.
150. *See* CHANDLER, *supra* note 143, at 118.
151. *See id.* at 117-18; POUND, *supra* note 143, at 80-82; WEISENBERGER, *supra* note 143, at 50-52, 100-106.
152. CHANDLER, *supra* note 143, at 118.
153. *See id.* at 119.
154. *See* POUND, *supra* note 143, at 89-90.
155. *See* ED CRAY, CHROME COLOSSUS: GENERAL MOTORS AND ITS TIMES 90 (1980).
156. POUND, *supra* note 143, at 90.
157. *See* CRAY, *supra* note 155.

important component parts, it relied on suppliers such as Mott's axle works and the Durant-Dort companies.[158] The latter, through Imperial Wheel, supplied many of the wheels for the Buick Model 10s.[159] One of these cars was purchased by Donald MacPherson.

By the time MacPherson went to Close Brothers for his Model 10 Buick, cars were entering the American scene as standard means of transportation. As Ed Cray notes, "[p]urchasers no longer bought automobiles as mechanical curiosities; they presumed their reliability."[160] This "presumed reliability" was, in large part, a function of brand name recognition fostered by the sort of public relations and advertising described by Marchand.[161] It would come to play a critical role in shaping Cardozo's attack on the citadel of privity as he established Buick's liability to MacPherson for the harm caused by the defective wheel on the car it had produced in distant Michigan.

C. Cardozo's Decision

As mentioned above, Cardozo held Buick liable to MacPherson on the grounds that an automobile rated to go fifty miles an hour becomes a thing of danger if negligently made.[162] The jury found such negligence, thus, MacPherson had a legitimate legal claim in tort.[163] Central to Cardozo's holding were the ideas of foreseeability and inspection.[164] Thus, he asserted that "[i]f [the manufacturer] is negligent, where danger is to be foreseen, a liability will follow."[165] Buick knew that the car was to be used by persons other than the buyer: first, because Close Brothers was a dealer in cars; and second, because the car itself was constructed to hold at least three people.[166] Therefore, the injury to a subsequent purchaser such as MacPherson was reasonably foreseeable.[167] Cardozo also called attention to the fact that the wheel's "defects could have been

158. *See* CHANDLER, *supra* note 143, at 117-18.
159. *See MacPherson*, 138 N.Y.S. at 225.
160. CRAY, *supra* note 155, at 119.
161. *See* MARCHAND, *supra* note 59, at 7-47.
162. *See* MacPherson v. Buick Motor Co., 111 N.E. 1050, 1053 (N.Y. 1916).
163. *See id.* at 1054-55.
164. *See id.* at 1053.
165. *Id.*
166. *See id.*
167. *See id.* at 1053-54.

discovered by reasonable inspection"[168] and additionally, that the goods would probably be used by the ultimate purchaser "before a reasonable opportunity for discovering any defect which might exist."[169] Thus, in addition to knowledge that the product would be used by such a person as the plaintiff, knowledge of the defect itself had to be imputed to Buick through the idea of inspection. Moreover, there is an implication that a reasonable expectation, opportunity, or duty of subsequent inspection on the part of MacPherson might have insulated Buick from liability. One reason MacPherson's lack of inspection did not insulate Buick from liability may be inferred from Landes' and Posner's identification of automobiles as typical "credence" goods, where the complexity of the product confers on the consumer a reasonable basis for relying upon the manufacturer to establish its soundness.[170] By 1910, cars in general were presumed to be reliable and Buick in particular had a strong positive reputation in the market.[171]

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168. *Id.* at 1051.

169. *Id.* at 1052.

170. *See* LANDES & POSNER, *supra* note 106, at 284-85.

171. MacPherson sued only Buick but there were at least two other relevant parties to the accident: Imperial Wheel and Close Brothers. *See* MacPherson v. Buick Motor Co., 138 N.Y.S. 224, 224-25 (N.Y. App. Div. 1912); MacPherson v. Buick Motor Co., 145 N.Y.S. 462, 462-63 (N.Y. App. Div. 1914); PECK, *supra* note 130, at 54-55, 62-63; WEISENBERGER, *supra* note 143, at 96. Cardozo deliberately bracketed the issue of Imperial Wheel's potential liability as it was not directly at issue. Nonetheless, in doing so he again pointed out the importance of inspection, stating that "[t]o make their negligence a cause of [action] . . . the manufacturer of the finished product must also fail in his[/her] duty of inspection." *MacPherson*, 111 N.E. at 1053. In any event, as a practical matter, Imperial Wheel was controlled by Durant as well and so suing it would not likely have implicated any new financial interests. *See* POUND, *supra* note 143, at 82. As for Close Brothers, MacPherson was directly in privity with them and so there was no issue about his ability to sue them. *See* PECK, *supra* note 130, at 54-55, 62-63. But they were a small local concern with modest resources and so not as fruitful a target of litigation. They, too, however, could potentially have inspected the wheel. That fact that such a failure on their part did not insulate Buick from liability also reflects an understanding both of the complex nature of the product involved and of the distinctive relationship between the Buick and its cars.

V. THE LEGAL BIOGRAPHY OF MACPHERSON'S MODEL 10

Tying all these parties together is the object of the car itself, or rather, two objects: the car and its defective wheel. At times distinct, and at times functionally identical, these two products of modern industrial manufacture and national commerce provide the basis for Cardozo's construction of the relationship among the relevant parties to the action. In tracing the course of wheel and car, Cardozo implicitly constructs and acts upon a biography of these products. At each stage in the car's production, marketing, and use, Cardozo situates it in relation to time, space, and the market in such a way as to establish the contours of corporate agency, will, and accountability.[172]

Buick itself consciously created biographies for its products through advertising and public relations.[173] It represented itself through its products as a manufacturer of reliable automobiles.[174] Buick's corporate identity was carried out into the marketplace by its advertisements and products, which, in turn, provided the basis to influence and inform the consumer. MacPherson's Model 10, thus, both embodied and asserted Buick's identity in the market. Through this relationship, the Buick Corporation used its identity to extend its power and profits.[175] By establishing liability in the absence of privity, Cardozo effectively turned Buick's identity—its presence in the market and in society through its products—back upon the corporation. His opinion enabled, mediated, and shaped a situation whereby the consumer was able to recharacterize the product as "defective" and, hence, impose a new identity upon the corporation as "negligent."[176] The product here acts as a sort of nexus of communication and influence between consumer and corporation. Just as Buick projected a favorable image of itself outward to the consumer through its product, Cardozo's opinion allowed the consumer to use that

172. *See MacPherson*, 111 N.E. at 1053-55.

173. *See* WEISENBERGER, *supra* note 143, at 100, 105, 109-10.

174. *See* MARCHAND, *supra* note 58, at 131; WEISENBERGER, *supra* note 143, at 105.

175. *See* CRAY, *supra* note 155, at 90; WEISENBERGER, *supra* note 143, at 105, 109-10.

176. *See MacPherson*, 111 N.E. at 1053.

same product as a means to reimpose a different image or identity back upon the corporation.

It is important to note here that the issue was not one of the truthfulness or accuracy of the representations made by Buick. This was not a case of fraud or warranty. It was not a contest over the meaning of Buick's representations. Rather, it was a contest over the meaning of the product, and, thus of the corporation itself. In the context of product liability law, then, representation becomes a two-way street: it enables corporate influence over the consumer through the sort of public relations and advertising described by Marchand,[177] but it also opens the door to liability, which allows the consumer to impose a new identity back upon the corporation through its product. Product liability constructs Buick as "present" in its products in a manner such that harm caused by a defective automobile is deemed caused by Buick itself. Focusing on the legal biography of a material object, such as the Buick Model 10, enables us to concretize otherwise fairly abstract conceptions of, and arguments about, such doctrines as "duty" and "causation."[178]

In his essay, *The Cultural Biography of Things: Commoditization As Process*,[179] Igor Kopytoff examines the production of commodities as a "cultural and cognitive process," noting that "commodities must not only be produced materially as things, but also culturally marked as being a certain kind of thing."[180] He goes on to argue that the status of "commodity" is variable over time and space.[181] Commoditization is a process whereby a thing may enter, exit, and reenter that category of commodity depending on a range of factors.[182] Moreover, Kopytoff notes that the category "commodity" itself is not monolithic.[183] Across time and culture there may be

177. *See, e.g.*, MARCHAND, *supra* note 58.

178. Characterizations of the product may reflect and enact underlying assumptions about such doctrines but they do so in a particularized fashion that facilitates their location in a historical and social context.

179. Igor Kopytoff, *The Cultural Biography of Things: Commoditization As Process*, *in* THE SOCIAL LIFE OF THINGS: COMMODITIES IN CULTURAL PERSPECTIVE 64-91 (Arjun Appadurai ed., 1986).

180. *Id.* at 64.

181. *See id.*

182. *See id.* at 65-69.

183. *See id.* at 65-70.

various "types" of commodities each assigned to distinct subclassifications.[184] Hence, commodities have biographies—stories of their changing status and identity.[185] "In doing the biography of a thing," Kopytoff writes,

> [O]ne would ask questions similar to those one asks about people: What, sociologically, are the biographical possibilities inherent in its 'status' and in the period and culture, and how are these possibilities realized? Where does the thing come from and who made it? What has been its career so far, and what do people consider to be an ideal career for such things? What are the recognized "ages" or periods in the thing's "life", and what are the cultural markers for them? How does the thing's use change with its age, and what happens to it when it reaches the end of its usefulness?[186]

Kopytoff continues, noting that any given object may have multiple biographies.[187] Thus, a car, his felicitous example, may have a physical biography; a technical biography, such as its repair record; an economic biography, such as its changing value; and several possible social biographies, such as its relation to the owner-family's economy, impact on family structure, relation to class structure, etc.[188] For Kopytoff, what makes any biography "culturally informed" involves looking at the object "as a culturally constructed entity, endowed with culturally specific meanings, and classified and reclassified into culturally constituted categories."[189]

I wish to ask similar questions to develop a culturally informed "legal biography" of Donald MacPherson's Model 10 Buick. But where Kopytoff explored how a thing enters and exits categories of "commodity," I will examine how a commodity enters and exits categories that establish a basis for legal liability when it causes harm. *MacPherson* contains within it various biographies of the offending automobile. Cardozo's opinion implicitly endows the car

184. *See id.* at 66.
185. *See id.*
186. *Id.* at 66-67.
187. *See id.* at 68.
188. *See id.* at 67.
189. *Id.* at 68.

with specific meanings at different points in its biography that result in its being classified and reclassified into powerful legal categories. The car takes on a different status or identity at different stages of its career. Throughout, its character is shaped by its encounters with the relevant parties. From a generic mass-produced car—one of thousands—it eventually becomes a distinctive, singular cause of harm. In *MacPherson*, as the car's identity develops, it, in turn, reflects back upon and ultimately imposes upon its corporate producer, Buick, the legal identity of a liable party. In particular, I will explore how the car became a distinctive "conductor of liability"—an item through which the consumer was able to impose a legal burden upon a distant corporation; or, alternatively, an item sufficiently imbued with Buick's corporate identity at the moment it caused harm so as to sustain a claim that Buick, in effect, harmed MacPherson.

MacPherson's Buick went through several stages of identification. Each stage did not necessarily supplant the previous one but rather was layered upon it, eventually resulting in a thickly identified object with complex legal implications for diverse parties. These stages include: its initial creation as a physical thing; its introduction into the stream of commerce as a commodity; its purchase by Close Brothers as an item for resale; its purchase by MacPherson, marking it as "his" car, distinct from all others; its collapse, causing harm to MacPherson, which revealed it to be a "defective" product; the subsequent reinterpretation of its production, marking it as a "negligently made" product (which was in part a function of its related definition as an adequately "inspected" product); the definition of a defectively produced car as a "thing of danger"; the further designation of the car as a negligently made thing of danger that the manufacturer "knew" was going to be used by persons other than the immediate purchaser; and the final definition of the car layered with all these prior identities as a product that was sufficiently "identified" with its manufacturer to enable MacPherson to hold Buick liable for the injuries he suffered as a result of the car's collapse. By looking at how Cardozo constructs and employs such categories or classifications, we can get a fuller sense of the cultural and legal dynamics through which the "citadel of privity" was overthrown and corporations began to be held accountable to consumers.

In the beginning was the wheel. Imperial Wheel Company, a one-time maker of carriage wheels had moved with the times into the manufacture of automobile wheels.[190] In the early twentieth century, wheel making was still considered to be such a specialty, requiring distinctive skills and knowledge, that it remained largely separate from the overall manufacturing process of the major automobile companies.[191] As noted above, Imperial Wheel was closely related to Buick through the person of William Durant.[192] It supplied Buick with wheels for its cars, including the Model 10 that MacPherson purchased.[193] The wheels were made of hickory.[194] The wheel that ultimately splintered causing MacPherson's accident began its "life" as one of some 500,000 wheels furnished to Buick up to that point.[195] None had previously proven defective.[196] Thus, at the outset, the wheel had the "identity" of an Imperial wheel, a proven product, furnished by a reputable manufacturer.[197]

In constructing the legal biography of MacPherson's car, we must confront the threshold issue of the relation of the wheel to the car. Legally, was the wheel incorporated into the car, becoming merely a component part of Buick Corporation's Model 10; or did it remain an Imperial wheel, with a distinct legal identity and, hence, distinct implications for legal liability? Cardozo answers yes and maybe, respectively.[198] First, Cardozo clearly states that Buick, "was not merely a dealer in automobiles. It was a manufacturer of automobiles . . . . It was responsible for the finished product."[199] In Cardozo's story, the wheel becomes Buick's responsibility legally because Buick was the one who put the components together into the "finished product."[200] The wheel took on the identity of the Model

190. *See* PECK, *supra* note 130, at 47.
191. *See id.*
192. *See, e.g.*, WEISENBERGER, *supra* note 143, at 50-51, 162.
193. *See* PECK, *supra* note 130, at 47.
194. *See id.* at 49.
195. *See id.* at 52.
196. *See id.* at 49-50.
197. *See id.* at 47.
198. *See MacPherson*, 111 N.E. at 1055.
199. *Id.*
200. *See id.* at 1053, 1055.

10 into which it was incorporated. No longer simply an Imperial wheel, it became part of a Buick.

The automobile's identity as a Buick, however, did not erase the presence of Imperial in the wheel. Rather, "Buick" was a new identity layered over the old that might obscure it for some purposes but not others. As a basic commodity, the identity of the wheel as distinctly attributable to Imperial was apparently irrelevant both to Close Brothers and to MacPherson. They bought a Buick automobile in reliance on Buick's name and reputation. Cardozo recognizes, however, that once the commodity became a thing, a danger that caused harm to someone, the layered identity of the wheel became newly salient.[201] In assigning responsibility for the harm, the identity of the automobile as a Buick could be disaggregated into its original component parts.[202] Cardozo initially brackets the issue by stating that the court was not required to "go back [to] the manufacturer of the finished product and hold the manufacturers of the component parts [liable]."[203] Nonetheless, Cardozo considers the possibility, noting that to find Imperial's negligence "a cause of imminent danger . . . the manufacturer of the finished product must also fail in his duty of inspection."[204]

Implicit in Cardozo's discussion of Imperial's potential liability is a complex understanding of how the legal biographies of the wheel and the car intertwined and informed one another.[205] Upon its creation, the wheel was a generic commodity, merely one of thousands provided to Buick for incorporation into its cars.[206] Its identity as an Imperial wheel was relevant to Buick because Imperial was a "reputable manufacturer" of automobile wheels.[207] Buick incorporated the wheel into a Model 10, a larger common commodity, one of thousands made that year.[208] When sold to Close Brothers and resold to MacPherson, the wheel mattered primarily as component of a Buick Model 10. But when the wheel splintered, resulting in the collapse

201. *See id.* at 1053.
202. *See id.*
203. *Id.*
204. *Id.*
205. *See id.* at 1055.
206. *See* PECK, *supra* note 130, at 52.
207. *See MacPherson*, 111 N.E. at 1055.
208. *See* PECK, *supra* note 130, at 52.

of the Model 10 and injury to MacPherson, the wheel and the car both exited the category of common commodity and became singularized objects imbued with special legal significance. No longer mere commodities on the market, they were now distinct "defective products" that had caused injury. First, Cardozo asserted that the wheel's identity as an "Imperial" wheel would have legal significance only if it could be further classified as an "uninspected" wheel.[209] This implies first, that if Buick had reasonably exercised its duty of inspection and found no defect, then the wheel would enter the category of either: (a) a nondefective wheel that nonetheless somehow caused an accident (and since Cardozo was not advancing a theory of strict liability here, Buick, presumably would not be held liable in such a case); or (b) a defective wheel for which Buick could not be held liable but that Imperial might.[210] Second, Cardozo's assertion implies that if Buick failed adequately to inspect the wheel, then it became lodged in two categories of legal import: part of a defective Buick Model 10, and a defective Imperial wheel. The Model 10 could only be defective if the wheel were defective. But, if Buick exercised its duty of inspection, a defective Imperial wheel need not necessarily make the Model 10 defective. Depending on circumstance, particularly on Cardozo's construction of the "duty" to inspect, the various identities of the things at issue might be either entwined or distinguished.[211]

After leaving the assembly plant in Flint, MacPherson's Model 10 was sold to Close Brothers.[212] Close Brothers' identity as a car dealership bore directly on Cardozo's construction of Buick's liability beyond privity.[213] To establish such liability, Cardozo focused on the foreseeability of the injury.[214] For the harm to MacPherson to be foreseeable, Buick had to know that the Model 10 would be used by persons other than the purchaser.[215] Cardozo constructively established such knowledge in two ways. First, because Buick knew that

209. *See MacPherson*, 111 N.E. at 1053, 1055.
210. *See id.* at 1053.
211. *See id.* at 1053.
212. *See* MacPherson v. Buick Motor Co., 138 N.Y.S. 224, 224-25 (N.Y. App. Div. 1912).
213. *See id.*
214. *See MacPherson*, 111 N.E. at 1053-54.
215. *See id.* at 1053.

Close Brothers was a dealer, it could be charged with knowledge that the car would be used by persons other than the immediate buyer.[216] That is, upon sale to Close Brothers, the common commodity Buick Model 10 took on the additional identity of a "commodity for resale." Second, the design of the product itself, by including seating for up to three, designated it as a car for use by more than one person.[217]

When MacPherson purchased the car, he bought it as a Buick Model 10—one of the most popular automobiles of the day made by one of the best known corporations.[218] When he took possession it became his car—MacPherson's Buick. He bought it for use, not resale. At the time, 1910, and place, upstate New York, it may also have taken on for him the additional identity of what Kopytoff terms a "prestige" item, holding a status value for him beyond its basic price.[219] In such case, part of its prestige would derive from Buick's reputation with the public.[220] In this relationship, Buick manufactured not only automobiles but a reputation as well.[221] MacPherson purchased both when he bought the car. As "MacPherson's Buick," it was both the singular car, taken out of the stream of commerce for use by a specific individual, and part of a larger group of common commodities associated with the Buick Corporation. In a newly expanding national market economy, increasingly permeated with brand name products, such a dual association became central to marketing strategies whereby distant corporations imparted an attractive identity—or "soul" as Marchand might say—to their products.[222] The brand name and reputation of Buick took the automobile out of the realm of a purely generic commodity and imbued it with a distinctive identity.[223] In this regard, the logic of advertising implies a sort of labor theory of value: Through the combined labor of production, marketing, and advertising a brand name product, the

216. *See id.*
217. *See id.*
218. *See* PECK, *supra* note 130, at 40.
219. *See* Kopytoff, *supra* note 179, at 71.
220. *See id.* at 71.
221. *See id.* at 73-77.
222. *See* MARCHAND, *supra* note 59, at 3-4.
223. *See, e.g.*, KOPYTOFF, *supra* note 179, at 73-77.

corporation infused its products with aspects of its own identity.[224] The Buick Corporation was "present" in the automobile through its brand name and reputation. Thus, once the product became a brand name commodity in the national market, its developing identity implicated the identity of the corporation that produced it. At this point, the legal biography of the Model 10 begins to reflect back upon the identity of the Buick Corporation.

When MacPherson's Buick broke down, it became something new. At trial the jury established, and Cardozo later affirmed, that it was a defective product.[225] As such, it gained a new type of singularity that set it apart from all other similar products. It was now "MacPherson's defective Buick," three layers, at least, of relevant identities for establishing liability. But not all defects may be legally significant. Cardozo was careful to further identify this particular defect as one that made the car "a thing of danger."[226] The next step in the car's legal biography was the further determination that it was somehow negligently made.[227] This determination provided a critical link between the car's identity and the identity of the producing corporation, Buick. As the car became designated as "MacPherson's negligently made, dangerously defective Buick," it imposed back upon the Buick corporation the identity of "negligent."[228]

Inspection and foresight were also critical to imposing the identity of negligence.[229] First, Buick was held liable because it failed in its duty to adequately inspect MacPherson's car.[230] Alternatively phrased, one might say that MacPherson's car became a basis for imposing liability upon Buick because of its status as an "inadequately inspected defective product."[231] The adequacy of inspection was determined not simply by some abstract appeal to duty, but by a concrete examination of the material object, how it was made, how it manifested itself to the beholder, and how craftsmen skilled in the art

224. *See id.* at 71.
225. *See MacPherson*, 111 N.E. at 1053.
226. *Id.*
227. *See id.*
228. *See id.* at 1053-54.
229. *See id.*
230. *See id.* at 1053.
231. *Id.*

would understand what they saw.[232] Thus, at trial, extensive testimony was devoted to the nature of hickory wood in general, the particular defects of the specific hickory used in the wheel that splintered on MacPherson's car, and the types of tests a wheelwright or car manufacturer might reasonably be expected to employ to uncover such defects.[233] At trial, the failure of adequate inspection was, in effect, determined by reasoning back from the material object to Buick.[234]

Second, foresight—or lack thereof—also played a key role in establishing Buick's identity as negligent.[235] Cardozo identifies two key sites where foresight mattered most: the product itself, and the market:

> If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger. Its nature gives warning of the consequences to be expected. If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser, and used without new tests, then, irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully . . . . We are dealing now with the liability of the manufacturer of the finished product, who puts it on the market to be used without inspection by his customers. If he is negligent, where danger is to be foreseen, a liability will follow.[236]

The "nature" of the product itself gave warning, thereby defining and imposing the basic duty of foresight.[237] Central to Cardozo's construction of this "nature" was his identification of the Model 10 as a "thing of danger" when negligently made.[238] For Cardozo, the introduction of the car into a stream of commerce in a national market was critical to elaborating the scope and reach of the foresight required of Buick.[239] The extended web of market relations between

232. *See id.*
233. *See MacPherson*, 138 N.Y.S. at 226.
234. *See* PECK, *supra* note 130, at 47-52.
235. *See id.* at 53; *MacPherson*, 111 N.E. at 1053.
236. *MacPherson*, 111 N.E. at 1053.
237. *See id.*
238. *See id.*
239. *See id.*

Buick, Close Brothers, and MacPherson also shaped the relation between inspection and foresight.[240] Cardozo did not expect a retail purchaser to be in a position to conduct new tests, hence, there was a heightened burden upon Buick to conduct adequate initial inspections.[241] Then, given Buick's choice to introduce the product into the market, Cardozo imposed upon the corporation a constructive knowledge or foresight of the range of individuals who might become users of its product.[242] The reality of newly evolved, extended market relations dominated by large and often distant corporations thereby contextualizes Cardozo's construction of Buick's liability. As he subsequently notes, "[p]recedents drawn from the days of travel by stagecoach do not fit the conditions of travel to-day."[243]

Cardozo was finely sensitive to the need to adapt legal principles to meet modern conditions. "In the complexities of modern life," he wrote in 1924, "there is a constantly increasing need for resort by the judges to some fact-finding agency which will substitute exact knowledge of factual conditions for conjecture and impression."[244] In *MacPherson*, the technical complexity of the automobile demanded an evaluation of what constituted reasonable inspection by various experts at trial.[245] Cardozo felt that the social and economic complexity of modern American market relations called upon him to extend the duties imposed by the technical demands of inspection beyond privity of contract.[246] Thus, as he noted in *The Paradoxes of Legal Science*,

> When changes of manners or business have brought it about that a rule of law which corresponded to previously existing norms or standards of behavior, corresponds no longer to the present norms or standards, but on the contrary departs from them, then those same forces or tendencies of development that brought the law into adaptation to the old norms and standards are effective, without legislation, but

240. *See id.*
241. *See id.*
242. *See id.*
243. *Id.*
244. CARDOZO, *supra* note 126, at 117.
245. 111 N.E. at 1053, 1055.
246. *See* BENJAMIN CARDOZO, THE PARADOXES OF LEGAL SCIENCE 13-14 (1928); *see also MacPherson*, 111 N.E. at 1053.

> by the inherent energies of the judicial process, to restore the equilibrium.[247]

In upholding the extension of Buick's liability beyond privity of contract, Cardozo could reasonably see his opinion as restoring a sort of equilibrium that existed in the days of travel by stagecoach but had since been upset by changes in technology and business.[248] Indeed, as he stated later in the same book, "the judge, if he may not halt the march of civilization, may do something at times to moderate its pace, to mitigate its ruthless quality."[249]

VI. CORPORATE IDENTITY AND CORPORATE LIABILITY

Once the biography of a product that causes harm is elaborated, it still remains to connect it to a responsible party who may be held liable. Harm and liability in tort are intimately related to understandings of agency and will.[250] Liability requires an act or omission by an actor that results in harm to another.[251] When an object causes harm, it is not the object that is to blame but the actor who is held responsible for the object.[252] In constructing the relationship of responsibility between actor and object, the modern law of torts focuses in particular on the concept of "will."[253] It may be said that the will of the actor is said to inhabit the object that causes the harm. It is not the object per se that causes the harm but the actor, through his or her will as embodied in the object.[254] Thus, for example, in *The Common Law*, Holmes notes that it would be "unjust" to hold a man answerable "for having in a fit fallen on a man."[255] Here we have a straightforward separation of will from object. We may restate

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247. CARDOZO, *supra* note 246, at 14-15.
248. *See MacPherson*, 111 N.E. at 1053.
249. CARDOZO, *supra* note 246, at 58.
250. *See* WILLIAM L. PROSSER ET AL., THE LAW OF TORTS 682-84 (5th ed. 1984).
251. *See id.* at 33-39.
252. *See id.*
253. *See id.*
254. *See id.*
255. HOLMES, *supra* note 71, at 46. This example is drawn from a larger discussion of criminal liability, but it seems to me that the basic principles are equally applicable in tort. Indeed, Holmes directly relates this discussion to concepts of choice and foreseeability that also play a significant role in his later discussion of negligence.

Holmes' example by saying that the man's *body* fell on somebody, but the man himself did not. That is, his will or identity did not inhabit or impel his body to fall, hence, what fell was a mere physical object, without identity and hence without a relationship to a person sufficient to establish liability.

Similar distinctions are evident in the *Restatement of Torts* which, as noted above, Cardozo played a significant role in shaping.[256] For example, the *Restatement* defines the word "act" as "an external manifestation of the actor's will and does not include any of its results even the most direct, immediate and intended."[257] A comment elaborates:

> There cannot be an act without volition. Therefore, a contraction of a person's muscles which is purely a reaction to some outside force, such as a knee jerk . . . or the convulsive movements of an epileptic, are not acts of that person. . . . Since some outward manifestation of the defendant's will is necessary to the existence of an act which can subject him [or her] to liability, it is not enough to subject a defendant to liability that a third person has utilized a part of his body as an instrument to carry out his own intention to cause harm to the plaintiff.[258]

Here again, we find a disjunction between body and person. Without will, the body is merely an "instrument."[259] Moreover, it is an instrument that can be imbued with the will of a "third person," that is, someone other than the person who occupies the body.[260] In effect, "will" carries the "identity" of the actor into the object that causes harm.[261] The object itself has no inherent or essential legal identity absent a constructed relationship to an "actor," that is, to someone capable of projecting their identity into the object through the exercise of "will."[262] That negligence often involves an omission or failure to act does not vitiate the application of these principles to cases

256. *See* RESTATEMENT OF TORTS § 2 (1934).
257. *Id.*
258. *Id.* at § 2 cmt. a.
259. *See id.*
260. *See id.*
261. *See id.*
262. *See id.* at § 2 cmt. b.

of negligence.[263] Indeed, a failure to act involves a withholding of one's will from an area where the court determines it should be present.[264] In such a case, the court constructively imbues the object causing harm with the actor's will.[265] The *Restatement* argues for liability where "[a] manufacturer . . . fails to exercise reasonable care in the manufacture of a chattel which, unless carefully made, he should recognize as involving an unreasonable risk of causing [physical] harm . . . ."[266] In effect, the *Restatement* consigns the manufacturer's identity to travel with such a chattel through the market to a distant purchaser who may be harmed by the defect.[267]

Constructing the "will" of corporate actors was a major concern of the various theorists who hotly debated the question of corporate personality during the first third of the twentieth century.[268] This brings us back to Vinogradoff's argument that applying tort law to corporations implicated ethical and psychological issues that require the adoption of a real entity theory of corporate personality.[269] I. Maurice Wormser, a vehement critic of corporate irresponsibility, noted that:

> It is sometimes said that "corporations have no soul." If by the use of this expression is meant that corporations cannot entertain an intent, the statement is of course erroneous. . . . If what is meant, however, is that the "group will" of the corporate person may be very different from the wills and purposes of the individual associates, then the expression has real significance. There can be no doubt that men united into a corporate group will do things corporately and collectively which individually they would not think of doing . . . . Corporations, unlike individuals, unfortunately tend to have no moral standards. . . . [T]here is no denying

263. *See id.* at § 395 cmt. a.
264. *See id.*
265. *See id.* at § 395 cmt. b.
266. *Id.* at § 395.
267. *See id.*
268. *See, e.g.*, Machen, *supra* note 9, at 255-57; Vinogradoff, *supra* note 9, at 600-04.
269. *See* Vinogradoff, *supra* note 9, at 602.

> that the "group-will" of the corporate person all too frequently is a vicious one . . . .[270]

This invocation of the corporate soul calls to mind Marchand's discussion of how large corporations increasingly deployed public relations and advertising campaigns to address precisely the amoral image Wormser presents.[271] Wormser's deep concern over the viciousness of the corporate person derives both from his understanding of the structural dynamic of how people act differently when part of a collective, and from an appreciation of the great power modern corporations had in shaping social and economic life.[272]

Cardozo, too, addressed the question of corporate will and responsibility.[273] In the 1926 case of *Berkey v. Third Avenue Railway Co.*, he notably declared that the problem of piercing the veil of corporate identity in the relation between parent and subsidiary corporations was "enveloped in the mists of metaphor," adding that "[m]etaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it."[274] Two years later, Cardozo intoned a similar warning in addressing the problem of the relation of individual to group will in a manner that seems to address some of Wormser's concerns:

> The individual in the group . . . is not the same as the individual out of the group. His will has been transfigured by association with the wills of others. This does not mean that there is a mystical common will which belongs to the group as a person separate from its members. All that it means is that the wills of individuals like their habits and desires are modified by the interaction between mind and mind.[275]

More specifically, with reference to corporate personality, he observed that:

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270. WORMSER, *supra* note 9, at 100-01.
271. *See* MARCHAND, *supra* note 58, at 4, 10.
272. *See* WORMSER, *supra* note 9, at 100-01.
273. *See* Berkey v. Third Ave. Ry. Co., 155 N.E. 58 (N.Y. 1926).
274. *Id.* at 61.
275. CARDOZO, *supra* note 246, at 88.

> The general rule may still be that corporate personality is a legislative gift rather than a quality inherent in the very nature of a group. It seems, however, that at times even in our law a group has a solidarity so obvious as to evoke judicial recognition of its corporate or quasi-corporate existence, though no charter . . . has been . . . given . . . .[276]

Cardozo had a less fatalistic view of corporate personality than Wormser.[277] He recognized as an empirical matter that individual will was somehow transformed and remade through association.[278] But such association did not inevitably make it irresponsible or vicious.[279] Nonetheless, will was present in groups (and corporations) and hence had to be made accountable.[280]

In the particularized legal arena of products liability, Cardozo's opinion in *MacPherson* constructs Buick's will as sufficiently present in its defective products to imbue them with its corporate identity.[281] A defective product thereby provides a conduit through which an individual consumer may gain the upper hand in defining corporate identity and managing corporate accountability. In this case, Cardozo created a means for the consumer to contain and manage the corporate power by constructing a relationship between corporations and their products sufficient to sustain claims of liability in tort.[282] MacPherson's Model 10 was far easier to identify, classify, and manage as a defective product than was the entire Buick Corporation. Yet, by finding Buick "present" in the Model 10, Cardozo allowed MacPherson to hold the corporation liable *through* its product. That is, by characterizing the product, Cardozo characterized the corporation insofar as it was present in the product in a manner relevant to establishing liability.

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276. *Id.* at 91-92.

277. Not surprisingly, Wormser characterized Cardozo's decision not to pierce the veil of corporate identity in *Berkey* to be "lamentable." *See* WORMSER, *supra* note 9, at 104.

278. *See* CARDOZO, *supra* note 246, at 88.

279. *See id.* at 88-93.

280. *See id.*

281. *See* MacPherson v. Buick Motor Co., 111 N.E. 1050, 1055 (N.Y. 1916).

282. *See id.* at 1054-55.

VII. BUICK'S PRESENCE IN MACPHERSON'S MODEL 10

Buick's identity as "negligent" and, hence, liable, was derived in important ways through its relation to the material product that caused the harm—MacPherson's Model 10.[283] A closer examination of some key themes in Cardozo's legal biography of the car will provide a fuller understanding of the nature of Buick's "presence" in the product and the dynamic whereby the identities of each came to inform the other. Indeed, as I will elaborate below, Cardozo's path-breaking overthrow of privity can be understood largely in terms of how he implicitly constructed the corporation's identity as present in the product to a sufficient degree that when the product caused harm, the corporation itself could be understood as causing harm.[284] That is, in terms of legal liability, the Model 10 did not harm MacPherson per se, rather it was Buick as *present* in the Model 10 that harmed MacPherson. The Model 10 may be understood as an external manifestation of Buick's identity, carrying it through the market both as a brand name product capable of promoting Buick's reputation and as a representative conductor of liability. In what might be understood as a strange twist on the "politics of presence," representation turns out to be a two-way street and presence becomes a basis not only for articulating ideas and interests but also for being held accountable for one's actions.[285] Buick, in fact, was very assiduously trying to deny or obscure its presence in MacPherson's car; or alternatively, to use the doctrine of privity to insulate its presence, thereby preventing it from being used as a conductor of liability.[286]

I use the term "conductor of liability" quite deliberately because it calls to mind Oliver Wendell Holmes' characterization of the fiction of corporate personality as a "nonconductor" that protects individual shareholders from liability.[287] Just as the "veil of corporate identity" may be used as a shield to protect shareholders, it may also be used as a sword to hold corporations themselves accountable.[288]

283. *See id.* at 1055.
284. *See id.* at 1053-54.
285. *See, e.g.*, ANNE PHILLIPS, THE POLITICS OF PRESENCE 4 (1995).
286. *See MacPherson*, 111 N.E. at 1051, 1053.
287. *See* Donnell v. Herring-Hall-Marvin Safe Co., 208 U.S. 267, 273 (1908).
288. *See* Wormser, *supra* note 36, at 500, 512.

Far from "piercing the veil" of corporate identity, product liability plaintiffs need to extend the veil to envelop the defective product.[289] Thus, to the degree that a corporation can be legally established as "present" in a defective product, it may be held liable. In this manner, products liability doctrine lined the contours of corporate personality by determining how and where corporate identity might become manifest beyond the boundaries of the formal corporate organization. This was an especially pressing issue in Cardozo's time as large corporations were rapidly expanding their influence into multifarious aspects of American society and economy.[290] Thus, Cardozo states, "[w]e are dealing now with the liability of the manufacturer of the finished product, who puts it on the market to be used without inspection by his customers. If he is negligent, where danger is to be foreseen, liability will follow."[291] In these two sentences Cardozo succinctly states three factors that are critical to his construction of Buick's identity in the product and its resulting liability: inspection, foreseeability, and the context of the market.[292] Through inspection Buick becomes "present" in its product, infusing it with corporate identity in a manner relevant to liability. Through foresight the corporation's identity in the product is carried out to consumers. The market, in turn, contextualizes foresight and determines its range and boundaries. Each will now be considered in detail.

A. Inspection

In his initial characterization of the facts of the *MacPherson* case, Cardozo notes that "[t]here is evidence . . . that [the wheel's] defects could have been discovered by reasonable inspection, and that inspection was omitted."[293] From the outset, then, Cardozo casts the defendant's duty in terms of inspection.[294] Just what, however, did inspection entail and why was it so important to establishing liability? In distinguishing a previous case involving an exploding steam boiler where the court refused to extend liability beyond

289. *See id.*
290. *See, e.g.*, BOWMAN, *supra* note 2, at 69-70.
291. *MacPherson*, 111 N.E. at 1053.
292. *See id.*
293. *Id.* at 1051.
294. *See id.*

privity,[295] Cardozo noted that, "[t]he manufacturer knew that his own test was not the final one. The finality of the test has a bearing on the measure of diligence owing to persons other than the purchaser."[296]

The duty of inspection runs, in part, with the identity of the party in its relation to the relevant product. Thus, Cardozo concludes:

> We think the defendant was not absolved from a duty of inspection because it bought the wheels from a reputable manufacturer. It was not merely a dealer in automobiles. It was a manufacturer of automobiles. It was responsible for the finished product. It was not at liberty to put the finished product on the market without subjecting the component parts to ordinary and simple tests.[297]

In these few lines, Cardozo implicates the duties of all parties who had relevant relations to the defective product. The "reputable manufacturer" of the wheel may have a duty of inspection but it does not supersede, or "absolve" Buick of an independent duty to inspect.[298] This duty derives not merely from the fact that the wheel passed through Buick's hands but because it used the wheel in a particular fashion and for a particular purpose.[299] Through its labor—or rather the labor of its employees—Buick transformed the wheel into something new by incorporating it into a Model 10. Taking a Lockean approach to Cardozo's reasoning, we can say that in the act of manufacture, Buick effectively imbued the wheel with its identity through its labor. The presence of Buick's identity in the product provided the basis for imposing the duty of inspection which derived, in large part, from Buick's purpose of introducing the car into the market.[300] This duty stands in marked contrast to the duty of the "mere dealer" in automobiles, who in no way transformed the product and encountered the car only after it had been introduced into the

295. *See* Losee v. Clute, 51 N.Y. 494 (1873).

296. MacPherson v. Buick Motor Co., 111 N.E. 1050, 1052 (N.Y. 1916) (citations omitted).

297. *Id.* at 1055 (citing Richmond & Danville R.R. Co. v. Elliot, 149 U.S. 266, 272 (1892)).

298. *See id.*

299. *See* MacPherson v. Buick Motor Co., 138 N.Y.S. 224, 229 (N.Y. App. Div. 1912).

300. *See MacPherson*, 111 N.E. at 1055.

stream of commerce, and so bore only a minimal duty of inspection.[301]

Testing, a form of inspection, changes the character both of the inspected object and of the inspector. When an object enters the category of "inspected object" in its legal biography, it ceases to be a conductor of liability, provided the inspection was adequate according to prevailing norms of reasonable behavior within the relevant industry.[302] Moreover, even an uninspected object may cease to be a conductor of liability provided that it is reasonably expected to be subject to subsequent inspection.[303] Thus, the reasonable expectation, or fact, of subsequent inspection may also serve to render the object a nonconductor of liability.

Connecting these concepts back to the *Restatement's* definition of an "act",[304] we may understand inspection as an act of will that infused the product with the identity "inspected by Buick." Failure to inspect in a timely manner entailed an absence of will where society determined it should be present.[305] In such a case, will was imputed to the obliged party such that its identity constructively infused the product.[306] Thus, the Model 10 was inadequately inspected by Buick.[307] Buick's failure to inspect opened the door to the designation of "defective product" which in turn allowed for the imposition of liability upon Buick through the constructive presence of its identity in the defective product.[308] At each stage, inspection played a critical role in defining the identity of the parties in their relation to the defective product.[309]

Timely inspection was a type of nonconductor. It occluded past identities. That is, if an inspected wheel caused harm, it could not be classified as "defective" in a manner for which Buick could be held

301. *See id.*
302. *See MacPherson*, 138 N.Y.S. at 230.
303. *See* Losee v. Clute, 51 N.Y. 494 (1873).
304. *See* RESTATEMENT (SECOND) OF TORTS § 2 (1965).
305. *See MacPherson*, 111 N.E. at 1055.
306. *See id.* at 1052.
307. *See id.* at 1055.
308. *See id.* at 1053.
309. *See id.*

responsible.[310] Thus, if Buick had adequately inspected the wheel on MacPherson's Model 10, then when it fragmented, it would not be Buick's responsibility any more than if an epileptic hit someone with her hand during a seizure. Just as the epileptic's identity may be distinguished from her flailing hand, so too Buick's identity would be distinguished from its fragmenting wheel. In this scenario, inspection withdrew or insulated Buick's identity in the object. Its "will" and, hence, its identity would no more inform the defective wheel than would the epileptic's inform her flailing hand during a seizure.

Opportunity and skill play critical roles in Cardozo's construction of power of inspection to fix the identity both of an object and of the inspecting party. Thus, in discussing the case of *Heaven v. Pender*,[311] Cardozo focused on the court's assertion that central to extending privity was the fact that "the goods 'would in all probability be used at once . . . before a reasonable opportunity for discovering any defect which might exist. . . .'"[312] Cardozo continued, noting that the *Heaven* court implied a duty when "the thing supplied is of such a nature 'that [the user's want of] skill as to its condition . . . would probably cause danger to the person . . . .'"[313] An automobile is by its nature technically complex and while MacPherson had quite enough time to inspect his car, he did not have the technical know-how. Moreover, the Model 10 was a mass-produced commodity, introduced into the stream of commerce with the support of the best marketing and advertising strategies Will Durant could devise. As Cardozo later notes, under such circumstances "[t]he manufacturer who sells [an] automobile to the [retailer] *invites* the dealer's customers to use it."[314] The product carried the corporation's "voice"—a powerful sign of identity—out into the market, inviting consumers to buy and use the particular car distinctively marked as a "Buick." The invitation is not merely one for use but also for reliance upon the quality of the product evidenced by its brand name. The context of

310. *See MacPherson*, 138 N.Y.S. at 230.

311. 11 Q.B.D. 503 (1883) (extending liability to a dock owner who put up defective staging outside a ship that injured the workers of the ship owner for whom it was built).

312. *MacPherson*, 111 N.E. at 1052 (quoting *Heaven*, 11 Q.B.D. at 510).

313. *Id.* at 1052 (quoting *Heaven*, 11 Q.B.D. at 510).

314. *Id.* at 1054 (emphasis added).

the national market was central to determining the peculiar power of inspection to fix identity. Cardozo carefully noted that "[w]e are dealing now with the liability of the manufacturer of the finished product, who puts it on the market to be used without inspection by his customers."[315] Cardozo's construction of Buick's invitation to remote consumers for use without inspection makes sense only in the context of understanding the automobile as a technically complex "credence" good introduced into the stream of a complex national market through sophisticated marketing and advertising techniques.

As noted above, Landes and Posner connect the rise of products liability to the increasing complexity both of manufactured products and the web of market networks through which they were distributed.[316] The technical complexity of commodities, such as automobiles, reduced expectations that the consumer would have adequate time or expertise to inspect such products.[317] The social and economic complexity of extensive national markets attenuated the relation between producer and consumer and, so, increased expectations that the consumer could rely on—or, in Landes and Posner's term, give "credence" to—the manufacturer's reasonable inspection of items offered for sale and resale.[318]

Consumer reliance was constructed largely through the burgeoning profession of advertising.[319] More than merely presenting brand names to the public, advertising created powerful associations, images, and stories that imbued commodities with mystery and wonder.[320] Jackson Lears, in his cultural history of advertising, notes a shift occurring around the time of *MacPherson*, in which advertisers shifted from a more plain-spoken tradition of presenting basic facts about products to focusing more on image and fantasy.[321] "Automobile advertising," he states:

> [W]as a case in point . . . . [T]his plainspoken view was soon passé, except among the manufacturers themselves.

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315. *Id.* at 1053.
316. *See* LANDES & PONSER, *supra* note 106, at 284-88.
317. *See id.* at 284-85.
318. *See id.* at 284-87.
319. *See* LEARS, *supra* note 58, at 201-18.
320. *See id.* at 210-18.
321. *See id.* at 196-98.

> Among advertising people, the Chalmers and Pierce-Arrow automobile companies were soon being celebrated for "word painting the auto's seductive joys" and soft-pedaling any emphasis on 'mechanical excellence.'" The triumph of "atmosphere" in automobile advertising involved the incorporation of fantasy into the emerging distribution system . . .[322]

In this world of production and advertising, concern for "mechanical excellence" remained the province of the manufacturer.[323] Knowledge and inspection of the technical function of the product were consigned to this province and hence became the manufacturer's responsibility.[324] The consumer, on the other hand, encountered the product through the seductive "word-painting" and fantastic associations. In the new distribution system described by Lears, the consumer was not called upon to inspect a product for technical quality—that was the producer's job.[325] In the emerging advertising-driven national market, the producers themselves were invoking fantasy to market their products to consumers, calling upon their feelings and impressions, not their technical powers of inspection.[326] In this context, Cardozo, with his sensitivity to the demands of "modern conditions," could reasonably find that MacPherson had neither the opportunity, ability, nor responsibility to inspect the car.[327]

It is in this context that no duty or expectation of inspection was placed on the consumer. Hence, the identity of "inspector" with its attendant legal responsibilities, remained fixed on Buick alone. Thus, when MacPherson's Model 10 became a defective, negligently manufactured (i.e., inadequately inspected) good, Buick's identity as inspector connected it to the automobile in a manner sufficient to make it legally responsible for *foreseeable* harm caused by the defect.[328] The concept of foreseeability thus becomes a critical adjunct and modifier to the duty of inspection.

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322. *Id.* at 212-13 (citations omitted).
323. *See MacPherson*, 111 N.E. at 1052.
324. *See id.* at 1055.
325. *See* LEARS, *supra* note 58.
326. *See id.* at 215-17.
327. *See MacPherson*, 111 N.E. at 1052.
328. *See id.* at 1053.

B. Foreseeability

Where inspection is an act of will through which the corporation imbues a product with identity, foreseeability is a principle which regulates how that identity is understood to travel out into society and through the market. Let us return to some central language in Cardozo's opinion:

> If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger. Its nature gives warning of the consequences to be expected. If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser, and used without new tests, then, irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully. That is as far as we are required to go for the decision in this case.[329]

Foresight first comes into play in the act of production itself. "Reasonable certainty" about the danger of a defective product requires foresight into its possible impact on users.[330] In this case, the "nature"—apparently common sense understanding—of the thing itself provides the basis for imputing foresight to Buick.[331] At this early stage in the biography of the car, foresight carries Buick's identity as manufacturer of the car into an object that has now become "a thing of danger."[332] Absent a reasonable expectation of foresight of danger, the defective car would not carry Buick's identity with it. Or rather, the car would remain a Buick, but that part of its subsequent identity that marked it as defective—after the accident—would not be traceable back to Buick. Foresight here becomes a vector that carries Buick's identity outward along the trajectory traced by the car's legal biography.

The next stage of foresight involves knowledge that the car "will be used by persons other than the purchaser."[333] At this point, foresight carries the corporation's identity in the product beyond privity of contract out into society and the market. Buick's presence in

329. *Id.*
330. *See id.*
331. *See id.*
332. *See id.*
333. *Id.*

MacPherson's Model 10 extends as far as one could reasonably foresee that the car might be used. Beyond this range of foresight, the car, even if negligently made, would not carry Buick's identity. If it caused harm beyond the realm of foresight, it would no longer be animated by Buick's will and hence the injury could not be attributable to the corporation.[334] The spatial sense that Buick's identity and liability are somehow traveling outward with the automobile is reinforced by Cardozo's bracketing of his inquiry with the words, "[t]hat is as far as we are required to go . . . ."[335]

The vector of foreseeability may be interrupted by a subsequent duty of inspection.[336] Thus, if Cardozo had found it incumbent upon either Close Brothers or MacPherson himself to inspect the article, then Buick would have been absolved of liability.[337] Buick's foresight, in other words, was constructed to extend only so far as the next duty of inspection. Cardozo, however, constructs duties of inspection and foresight quite differently. Where inspection is determined in relation to expert knowledge and skill, foresight is determined more generally in relation to community norms of what a reasonable person would be expected to anticipate in a given situation.[338] Again employing the analogy of vectors, one might say that expertise is the vector through which Buick's identity enters the Model 10, but community norms are the vector that carries Buick's identity out into a relation with people in society that is capable of sustaining a basis for legal liability. The appeal to community standards for setting the bounds of foreseeability accords well with Cardozo's view of the role of judges as the "interpreters of the 'social mind.'"[339] It also provided the basis for asserting local norms of appropriate conduct into the market. Cardozo's use of foreseeability as a regulative principle in products liability thereby facilitated the imposition of community based nonmarket values over America's rapidly nationalizing corporate capitalist markets.

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334. *See id.*
335. *Id.*
336. *See id.* at 1054-55.
337. *See id.* at 1055.
338. *See id.* at 1052-53.
339. CARDOZO, *supra* note 246, at 49.

The appeal to community standards also echoes Holmes' earlier characterization of foresight as concerning "what a man of reasonable prudence would have foreseen."[340] Later considering the conditions under which it would be appropriate to hold a man liable for negligence, Holmes asserted that, "they must be such as would have led a prudent man to perceive the danger, although not necessarily to foresee the specific harm. But this is a vague test. How is it to be decided what those circumstances are? The answer must be experience."[341] He concludes that, "as the teachings of experience are matters of fact, it is easy to see why the jury should be consulted with regard to them."[342] Similarly, as Kaufman notes of Cardozo, "[f]oreseeability, not as an abstract notion but in the context of a factual setting, was crucial to [his] idea of the duty of care that underlay liability for negligence."[343] It was, then, peculiarly the province of the local community to determine the nature and limits of foresight.[344] In the context of early twentieth century products liability, this approach lodged in the locality a countervailing power to manage at least a small portion of a market economy that was increasingly dominated by large, distant, national corporations.[345]

Morton Horwitz contrasts the emergence of foreseeability as a regulative principle in tort against "late-nineteenth-century efforts to construct a system of private law free from the dangers of redistribution . . . [based on] the idea of objective causation."[346] Frances Wharton, in particular, saw a great threat of potential redistribution emerging from the doctrine of foreseeability, particularly in tort.[347] Horwitz quotes him at length:

> "The consequence" of any foreseeability test . . . "would be that the capitalist would be obliged to bear the burden, not merely of his own want of caution, but of the want of caution of all who should be concerned in whatever he should produce." If courts could argue that intervening causes of

340. HOLMES, *supra* note 71, at 45.
341. *Id.* at 87-88.
342. *Id.* at 101.
343. KAUFMAN, *supra* note 81, at 311.
344. *See id.*
345. *See id.*
346. HORWITZ, *supra* note 2, at 51.
347. *See id.* at 54-59.

> an injury were foreseeable, the result "would be traced back until a capitalist is reached . . . ."[348]

This was, indeed, what Cardozo allowed MacPherson to do. In his hands, foreseeability became a doctrine in tort through which an individual consumer was able to "reach" distant corporations and exert considerable influence over their practices. Or rather, to put it another way, foreseeability carried the corporation's identity out into the market through its product to a point where consumers could then reach back to the corporation through the product.

C. The Market

At several points throughout his opinion, Cardozo emphasized the context of market relations as a basis for assessing Buick's liability.[349] Market relations conditioned the duty of adequate inspection and framed the scope of appropriate foresight.[350] Buick's "invitation" to third parties to use its products was carried forward through the channels of commerce. The market carried the corporation's "voice" to the consumer, both through the product as it passed from one party to another and through advertisements that suffused all society. The critical act in establishing Buick's liability beyond privity was not the manufacture of the car but the corporation's choice to introduce the car into the stream of commerce.[351] The market, in turn, defined the limits of foresight attributable to Buick. Buick's knowledge of who was likely to use the product was defined in terms of common understanding of the flow of a commodity through channels of commerce in the emerging national market economy.[352]

Buick's identity traveled with the Model 10 so long as it retained its complementary identity as a market-based commodity. One might hypothesize that if the automobile entered some other sphere of social relations, for example, as a display in a historical exhibit or as the source of power for a piece of agricultural machinery, it would cease to be identified as a "Buick" and hence any harm caused by a defective part would likely not be traceable back to the corporation.

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348. *Id.* at 58-59.
349. *See MacPherson*, 111 N.E. at 1053.
350. *See id.*
351. *See id.* at 1054-55.
352. *See id.* at 1053.

This is, perhaps, merely another way of stating that in such a circumstance, Buick could not foresee the harm because the car was not being used as intended by its producer. But Cardozo did not focus on Buick's intent in determining the scope of foresight.[353] He focused rather on inspection and the market.[354] In this context, intent was relevant, but primarily as it helped the court construct the relationship between the corporation and its product.[355]

It was specifically as a marketed commodity that the Model 10 demanded the type of inspection through which it became imbued with Buick's identity. The very same article produced as a gift would likely not have required the same degree of inspection or foresight. Thus, for example, in his famous article, *Assault Upon the Citadel*, in which he traces the extension of the rule of *MacPherson* into the realm of strict liability, William Prosser argued:

> In all of the cases in which strict liability has been accepted and applied, the defendant has been engaged in the business of selling goods of the particular kind. So far as can be discovered, the question has not even been raised as to whether the rule might apply to one who is not so engaged. One may predict with assurance that it will not. The housewife who sells a jar of jam to her neighbor, or the owner of a used car who trades it in to a dealer, will obviously stand on a very different footing so far as the justifiable expectations of third parties are concerned.[356]

The nexus of relations between parties, products, and the market is central to challenging the citadel of privity. Liability flows from a particular kind of stance one takes vis-a-vis the market. If the production and sale of an item are motivated primarily by the purpose to engage in market transactions for profit—a defining characteristic of business corporations—that is, if your identity is defined primarily in terms of your relation to the market—then you will be subject to liability beyond privity.[357] Your market-based identity will travel with your product to the foreseeable limits of market relations. If your

353. *See id.* at 1051-55.
354. *See id.* at 1053-55.
355. *See id.*
356. Prosser, *supra* note 106, at 1140-41.
357. *See id.* at 1101-02, 1123, 1140-42.

relation to the market is incidental or secondary to your purpose in selling an object—as with Prosser's example of the housewife—then your liability is to that extent attenuated.[358]

Referring back to Kopytoff's idea that an object can enter, exit and reenter commodity status at different stages in its biography, we might similarly trace how a party's relation to the market through the objects she produces might similarly vary over time. Thus, for example, one can imagine in the case of someone like Debbie Fields that she began by producing a few batches of cookies for sale to friends and neighbors and then gradually expanded into the corporate giant, Mrs. Fields' Cookies, with stores across America.[359] At some point along the way, Debbie Fields' relation to the market changed and we could reasonably expect her to be held liable beyond privity for defects in her cookies.

D. Liability and Legitimacy

Advertising functions both as a measure of the engagement of a party's identity in the market and as a means of projecting that identity outward to consumers. Together, advertising and the product itself provide key indexes of the presence of the producer's identity in the market. Jackson Lears notes that, "[w]ith the coming of mass production and planned obsolescence during the early twentieth century, many manufacturers still sought systematically to surround their products with a magical aura, to overcome the growing distance between the manufacturer and the buyer by personalizing the impersonal commodity."[360]

Marchand further notes how some public relations campaigns tried to personalize entire corporations through association with the identity of a founding director or emblematic employee.[361] The corporation and the commodity were mutually implicated in constructing an animating soul for each other.[362] Cardozo would hardly liken his conception of negligence to "magic." Nonetheless, the logic of

358. *See id.* at 1140-42.
359. *See* Mrs. Fields' History *at* http://www.mrsfields.com/history (last visited Sept. 17, 2001).
360. LEARS, *supra* note 58, at 380.
361. *See* MARCHAND, *supra* note 58, at 7-17, 26-28.
362. *See id.* at 1-41.

his decision in *MacPherson* involves a similar kind of "animation" of the "impersonal commodity" in a manner that implicated the "soul" or identity of the producing corporation.[363] Cardozo and advertisers both were concerned with bridging the gulf between distant corporate producers and individual consumers.[364] "Personalizing" a product through advertising involved making a generic commodity appear more singular and distinctive by infusing it with a particular identity.[365] Cardozo's opinion similarly "personalized" MacPherson's Model 10 by infusing it with Buick's identity as a negligent manufacturer—hence liable. He did so by drawing on his understanding of community norms and a "common sense" perception of the nature of market processes; not "magic" perhaps, but certainly an embrace of imprecise, intuitive, and contextual methods of legal interpretation.

Advertising and public relations were central to legitimizing the newly ascendant complex national corporations in the eyes of consumers.[366] As Marchand notes, the late nineteenth and early twentieth century was a time of intense public debate over the character or identity of the large corporation.[367] A "soulless"[368] corporation, without conscience, might reflect the "viciousness" feared by Wormser.[369] A vicious corporation would not be trusted, much less supported, by wary consumers.[370] Marchand's book chronicles the extensive and largely successful efforts by some of America's largest corporations to craft a corporate soul capable of sustaining public confidence.[371] But advertisements alone were not always enough. The flip side of professional advertising was fraud and hucksterism, which also permeated American culture during this era.[372] Lears, for example, notes how the field of patent medicine was particularly rife

363. *See* MacPherson v. Buick Motor Co., 111 N.E. 1050, 1051-55 (N.Y. 1916).
364. *See MacPherson*, 111 N.E. at 1051-55; MARCHAND, *supra* note 58, at 7-10.
365. *See* LEARS, *supra* note 58, at 138-39, 380.
366. *See* MARCHAND, *supra* note 58, at 1-2, 4-7.
367. *See id.* at 1-8.
368. *See id.*
369. *See* WORMSER, *supra* note 9, at 100-01.
370. *See id.*
371. *See* MARCHAND, *supra* note 58, at 1-5.
372. *See, e.g.*, LEARS, *supra* note 58, at 41-69, 137-77.

with flamboyant and egregiously overstated representations of product claims.[373] Concerns over wild representations for miracle cures played a major role in the passage of the Pure Food and Drug Act of 1906, arguably the first major federal intervention into the arena of regulating product quality.[374] In this context, advertisements might just as readily evoke intimations of fraud as endow a corporation with personality and soul. During the early decades of the twentieth century, even mainstream professional advertising firms were constantly struggling against the image of the Barnum-esque hustler on the make.[375] Advertisements, in short, were not always sufficient to confer legitimacy upon expanding corporate power.

Federal regulation, such as the Pure Food and Drug Act,[376] and such antitrust measures as the Clayton Act[377] and the creation of the Federal Trade Commission,[378] complemented the project of corporate advertisement and public relations. Willard Hurst notes that "[b]etween the 1880's and the 1930's developments in both the law and the economy made issues of legitimacy central to the course of public policy concerning the business corporation."[379] Most corporations eventually accepted a measure of control over their operations in return for the legitimacy and stability conferred by the imprimatur of federal regulation.[380] Federal regulation, however, also had its limits. In an era when government was becoming as complex and as distant from citizens as big business, an alienated public was often skeptical of politicians and regulators perceived as closely allied with corporate interests.[381]

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373. *See id.* at 154-61.

374. *See id.* at 157.

375. *See id.* at 41-69, 142-67.

376. Pure Food Act, ch. 3915, 34 Stat. 768 (1906), *repealed by* Federal Food, Drug, and Cosmetic Act, ch. 675, § 902(a), 52 Stat. 1040, 1059 (codified as amended at 21 U.S.C. § 301 (1938)).

377. Clayton Act, ch. 323, 38 Stat. 730 (1914) (codified as amended at 15 U.S.C. §18 (1994)).

378. Federal Trade Commission Act, ch. 311, 38 Stat. 717 (1914) (codified as amended at 15 U.S.C. §§ 41-58 (1995)).

379. JAMES WILLARD HURST, THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES, 1780-1970, at 59 (1970).

380. *See, e.g.*, JAMES WEINSTEIN, THE CORPORATE IDEAL IN THE LIBERAL STATE, 1900-1918 (1968).

381. *See, e.g.*, ALAN DAWLEY, STRUGGLES FOR JUSTICE: SOCIAL

Product liability doctrine provided an added measure of legitimacy that was peculiarly well suited to an emerging consumer society. Where advertising originated from the corporations themselves, and regulation came from the government, products liability was a distinctively intimate and personal means for diverse individuals to assert their power into market relations with corporations. Advertising and regulation both played critical roles in creating and sustaining consumer confidence in products manufactured by distant corporate giants. Product liability added an additional, complementary dimension that specifically empowered the individual consumer to assert his or her will as a consumer. Advertisements might make corporations appealing, federal oversight might make them predictable, but product liability made them accountable to individual consumers.

Finally, product liability provided a vehicle, so to speak, through which the corporation could reclaim and rehabilitate its spoiled identity. While the suit marked Buick as "negligent," with the payment of the judgment to MacPherson, Buick's identity in the defective Model 10 ceased to have any continuing legal relevance. The car remained defective, but no longer could any harm resulting from it be attributed back to Buick. The legal proceeding provided closure that allowed Buick, in effect, to withdraw from any further chapters in the car's legal biography. Buick's identity as negligent became bracketed in time and space within a past transaction allowing the corporation in the future to project a rehabilitated identity of a responsible party in its ongoing market relations.

VIII. PRODUCTS LIABILITY AND THE NEW CORPORATE CITIZEN

Federal regulation, national advertising, and product liability all emerged during the Progressive Era as powerful means to identify and situate the modern corporation in American society. The "corporate reconstruction of American capitalism" which for Martin Sklar marked the ascendance of the corporate-administered market[382] also implicated conceptions of the corporation not only as an economic entity but also as a "person." Echoing Sklar's distinction

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RESPONSIBILITY AND THE LIBERAL STATE 141-71 (1991); GRANT MCCONNELL, PRIVATE POWER AND AMERICAN DEMOCRACY (1966).

382. *See* SKLAR, *supra* note 37, at 20.

between an older proprietary-competitive and a newly ascendant corporate-administered market form of capitalism, Michael Sandel argues that federal antitrust regulation embodied both "civic" and "consumer-oriented" views of the nature and role of the corporation in American society.[383] "Civic" views were represented by arguments for a political economy of citizenship that saw federal regulation of corporations as protecting "the decentralized economy of small businesses and trades long seen as essential to self-government."[384] Sandel notes that "producer-based" reform efforts reflected a republican tradition of political economy in which "producer identities mattered because the world of work was seen as the arena in which, for better or worse, the character of citizens was formed."[385] Consumer-based reform efforts, by contrast, focused simply on "how best . . . to satisfy" consumer preferences, without considering how to "improve or restrain" them.[386] "The shift to consumer-based reform in the twentieth century," concludes Sandel, "was thus a shift away from the formative ambition of the republican tradition, away from the political economy of citizenship."[387]

Product liability similarly implicated civic and consumer-based conceptions of citizenship. The status and role of consumer clearly predominated as it provided the defining relationships establishing claims and liability.[388] But in its articulation of standards of corporate responsibility, product liability, at its inception, also had the "formative ambition" of making corporations better citizens.[389] In empowering consumers, product liability law gave average citizens an important means to articulate and assert their interests and thereby set certain limits to corporate power. But it also fostered an atomistic, individualized, and procedural conception of individual citizenship decried by Sandel as devoid of substantive commitments and fostering alienation and disillusion.[390] The citizen who brings a

383. *See* MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY 231-32 (1996).
384. *Id.* at 232.
385. *Id.* at 224.
386. *Id.* at 225.
387. *Id.*
388. *See id.* at 221-27.
389. *See id.* at 225.
390. *See id.* at 221-27.

product liability suit vindicates his or her individual rights as a consumer, but in isolation from any larger conception of the public good or the proper relations among citizens, corporation, and government on a larger scale. Product liability suits contribute to the maintenance of what Sandel calls a "consumerist vision" which focuses on the gratification of material wants and promotes a notion of persons as free, unencumbered selves, who are defined primarily by their autonomy and ability to exercise free choice.[391] Thus, there was a cost to the power attained through Cardozo's opinion in *MacPherson* and its progeny. Product liability fragmented and individualized opposition to corporate irresponsibility, making it the concern of individual plaintiffs, not of the polity as a whole. Individuals gained power as consumers, but perhaps at the expense of their solidarity as citizens.

Product liability also constructed the corporate citizen. Cardozo's focus on Buick's *choice* to introduce its products into the stream of commerce echoes the liberal focus on choice as the defining characteristic of the autonomous individual in what Sandel calls the "procedural republic."[392] Similarly, Lawrence Friedman sees the early twentieth century as the time during which America emerged as a "republic of choice" in which "the right to 'be oneself,' to *choose* oneself, is placed in a special and privileged position; in which *expression* is favored over *self-control* . . . ."[393] The corporate citizen of the procedural republic, anthropomorphized through theories of corporate personality, was defined by its capacity to choose and was held responsible for the foreseeable consequences of those choices.[394] It was primarily evaluated not in terms of its contribution to substantive social goals but by its capacity to meet individual consumer wants.[395] It expressed itself through its products. Product

391. *See id.* at 93-100, 221-27, 260-62.

392. *See generally* Michael J. Sandel, *The Procedural Republic and the Unencumbered Self*, 12 POL. THEORY 81 (1984) (discussing the history and formation of the "procedural republic").

393. LAWRENCE M. FRIEDMAN, THE REPUBLIC OF CHOICE: LAW, AUTHORITY, AND CULTURE 3 (1990) (emphasis in original).

394. *See id.* at 193-94.

395. It was precisely this status that Maurice Wormser decried in 1931, arguing that the corporation should be viewed as a public trust, a socialized form of capitalism that recognized an affirmative duty to the community as a whole.

liability legitimized and validated corporate expression in products by providing a measure of accountability.

Cardozo's opinion in *MacPherson* ushered in the new corporate citizen. Product liability determined that the corporate person manufacturing commodities for sale in the market became "present" in its products through the acts (or omissions) of production and inspection. As the products traveled out into the market, the corporation's identity traveled with them. The boundaries of the corporate person thus extended outward across the nation through a complex web of social and economic market relations. The product, as a critical site for the encounter between corporation and consumer, became a nexus through which legal relations of responsibility and liability were determined, mediated, and enforced. Product liability empowered the consumer by providing access to the corporation through its products. Ironically, it also empowered the corporation by freeing it from the substantive burdens of a more civic conception of corporate citizenship. Instead, the logic of product liability supported an evaluation of the corporation primarily in terms of its ability to satisfy consumer demands independent of any larger social purpose.

See WORMSER, *supra* note 9, at 226-42. The following year the calamities of the Depression also prompted Adolf A. Berle and Edwin Merrick Dodd to engage in a debate over the social responsibilities of the corporation. *See* BOWMAN, *supra* note 2, at 131-32. Berle expressed skepticism that legal doctrine would recognize corporate responsibility to society absent legislative intervention, while Dodd thought existing law capable of expanding to accommodate newly pressing concerns over the public responsibilities of corporations. *See id.* at 131-32 (providing a thoughtful review of this exchange).